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APPENDIX A

Supreme Court of Alabama.

BT SECURITIES CORPORATION et al.
v.
W.R. HUFF ASSET MANAGEMENT CO., L.L.C.

1021226.

April 16, 2004.

Facts and Procedural History

This case involves the applicability of the Securities Litigation Uniform Standards Act of 1998 (**"SLUSA"**), 15 U.S.C. §§ 77p and 78bb, to a purchase of subordinated notes by W.R. Huff Asset Management Co., L.L.C., from BT Securities Corporation. On August 10, 1995, Bruno's, Inc., issued $400 million of high-yield subordinated notes. Huff, an investment management company, purchased $290 million of those notes on behalf of its customers in November 1995. On February 2, 1998, Bruno's and its subsidiaries filed a petition in bankruptcy in the District of Delaware under Chapter 11 of the Bankruptcy Code. *See In re PWS Holding Corp.*, No. 98-212 (Bankr.D.Del., Dec. 30, 1999), *aff'd*, 228 F.3d 224 (3d Cir. 2000)

On August 4, 1999, Huff sued Kohlberg Kravis Roberts & Co., L.P., the company that acquired control of Bruno's in 1995, in the Jefferson Circuit Court. The action related to

Kohlberg's participation in Bruno's recapitalization. Kohlberg had the case removed to the United States Bankruptcy Court for the Northern District of Alabama because of Bruno's pending bankruptcy proceeding in Delaware. Huff moved the bankruptcy court to remand the action to state court, and on January 4, 2001, the bankruptcy court transferred the case to the United States District Court for the Northern District of Alabama. On July 1, 2002, Huff moved the district court to remand the case to state court, but the district court determined that Huff's claims were preempted by **SLUSA** and dismissed Huff's claims without prejudice. *See W.R. Huff Asset Mgmt. Co. v. Kohlberg Kravis Roberts & Co.*, 234 F.Supp.2d 1218, 1227 (N.D. Ala. 2002)("*Huff I*").

In the meantime, on April 28, 2000, Huff filed a second action involving the Bruno's notes, from which this permissive appeal is taken. Huff sued BT Securities Corporation, Chase Manhattan Bank, Salomon Brothers, Inc., Deloitte & Touche LLP, and Arthur Andersen LLP (collectively "BT Securities") in the Jefferson Circuit Court, alleging that BT Securities had engaged in fraud and misrepresentation in connection with the sale of the Bruno's notes. BT Securities removed the case to the United States District Court for the Northern District of Alabama. Huff moved the district court to remand the case to the state court. The district court, in an earlier unpublished opinion, found that "**SLUSA** was Huff's exclusive avenue for relief, found the existence of a federal question, and therefore denied Huff's motion to remand." It

encouraged Huff to request the United States Court of Appeals for the Eleventh Circuit to accept an appeal pursuant to 28 U.S.C. § 1292(b)(authorizing an interlocutory appeal). *W.R. Huff Asset Mgmt., Co., L. L. C. v. BT Sec. Corp.*, 190 F. Supp. 2d 1273, 1274 (N.D.Ala.2001) ("*Huff II*"). Huff moved the Eleventh Circuit Court of Appeals to accept his appeal; the Eleventh Circuit declined to do so.

Huff then moved the district court to reconsider its decision that **SLUSA** controlled its claims, or, alternatively, to sever the case as to one defendant, Deloitte & Touche, and remand, or, alternatively, to grant it leave to amend its complaint. BT Securities moved the district court to dismiss the action. On May 22, 2001, the district court determined that it lacked jurisdiction over Huff's action and remanded the cause to state court. *Huff II*, 190 F.Supp.2d at 1275.

On remand to the state court, BT Securities moved to dismiss Huff's action because, it argued, **SLUSA** preempted all of its claims. On March 31, 2003, the circuit court denied BT Securities' motion to dismiss. BT Securities petitioned this Court for a permissive appeal pursuant to Rule 5, Ala. R.App. P. On May 22, 2003, this Court granted BT Securities' petition for a permissive appeal as to the circuit court's denial of its motion to dismiss.

Standard of Review

This Court reviews de novo a trial court's conclusions of law. *See State Farm Mut. Auto. Ins. Co. v. Harris*, [Ms. 1020609, Nov. 26, 2003] --- So. 2d ----, ---- (Ala.2003).

> "The appropriate standard of review of a trial court's denial of a motion to dismiss is whether 'when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle [the pleader] to relief.' *Nance v. Matthews*, 622 So.2d 297, 299 (Ala.1993); *Raley v. Citibanc of Alabama/Andalusia*, 474 So.2d 640, 641 (Ala.1985). This Court does not consider whether the plaintiff will ultimately prevail, but only whether the plaintiff may possibly prevail. *Nance*, 622 So.2d at 299. A 'dismissal is proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.' *Nance*, 622 So.2d at 299; *Garrett v. Hadden*, 495 So.2d 616, 617 (Ala.1986); *Hill v. Kraft, Inc.*, 496 So.2d 768, 769 (Ala.1986)." *Lyons v. River Road Constr., Inc.*, 858 So.2d 257, 260 (Ala.2003).

Application of ***SLUSA***

The issue presented to this Court is whether the circuit court erred in denying BT Securities' motion to dismiss based on its conclusion that Huff's claims against BT Securities were not preempted by **SLUSA**. **SLUSA**

mandates that "covered class actions" brought *pursuant to state law must be removed* to federal court. *See* 15 U.S.C. § 77p(c)(requiring that "[a]ny covered class action brought in any State court involving a covered security ... shall be removable to the Federal district court for the district in which the action is pending"); *see also* 15 U.S.C. § 78bb(f)(5)(E) (defining a "covered security" to mean "a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 18(b) of the Securities Act of 1933, at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred"). Section 78bb(f)(5)(B) defines a "covered class action" as follows:

> "(i) any single lawsuit in which --
> "(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any question affecting only individual persons or members; or
> "(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and the questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

> "(ii) any group of lawsuits filed in or pending in the same court involving common questions of law or fact, in which--
> "(I) damages are sought on behalf of more than 50 persons; and
> "(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose."

Thus, for actions that fall within **SLUSA**, the federal court is the exclusive venue for securities fraud class-action litigation. *See Huff II*, 190 F.Supp.2d at 1278 ("subsection (b) [of 15 U.S.C. § 77p] compels a dismissal of actions based on state law if they allege fraud, deception, or misrepresentation regarding the purchase or sale of securities traded, or authorized to be traded, nationally").

> "Under **SLUSA**, a securities action is preempted only if four conditions are satisfied: (1) the action is a 'covered class action,' (2) the claims are based on state law, (3) the action involves a 'covered security,' and (4) the claims allege a misrepresentation or omission of material fact 'in connection with the purchase or sale' of the security."

In re WorldCom, Inc. Sec. Litig., [Ms. 02 Civ. 3288(DLC), Feb. 20, 2004] --- F.Supp.2d ----, ---- (S.D.N.Y.2004) (quoting 15 U.S.C. § 77p(b)). Huff concedes that this action is a covered class action pursuant to 15 U.S.C. § 78bb(f)(5)(B); that its claims are based on Alabama state law; and that

its claims allege a misrepresentation or omission of material fact in connection with the purchase or sale of the Bruno's notes. Huff argues, however, that the Bruno's notes were not "covered securities" as that term is defined by 15 U.S.C. § 78bb(f)(5)(E). To determine whether a security is a "covered security," we must determine whether the security was traded nationally or was authorized to be traded nationally at the time of the alleged wrongful conduct. *See* 15 U.S.C.§ 78bb(f)(5)(E) (defining a "covered security" as a security traded nationally or authorized to be traded nationally "at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred"). Thus, the inquiry is whether at the time of the alleged wrongful conduct the Bruno's notes were "covered securities" as that term is defined by 15 U.S.C. § 78bb(f)(5)(E).

Section 78bb(f)(5)(E) adopts the definition of a covered security in § 18(b) of the Securities Act of 1933, codified at 15 U.S.C. § 77r(b). Section 77r(b)(1) defines a covered security as follows:

> "A security is a covered security if such security is --
> "(A) listed, or authorized for listing, on the New York Stock Exchange or the American Stock Exchange, or listed, or authorized for listing, on the National Market System of the Nasdaq Stock Market (or any successor to such entities);
> "(B) listed, or authorized for listing, on a national securities exchange (or tier or segment thereof) that has listing

> standards that the Commission determines by rule (on its own initiative or on the basis of a petition) are substantially similar to the listing standards applicable to securities described in subparagraph (A); or
> "(C) is a security of the same issuer that is equal in seniority or that is a senior security to a security described in subparagraph (A) or (B)."

Huff concedes that because Bruno's common stock was listed on the National Association of Securities Dealers Automated Quotations ("NASDAQ") stock exchange and because the Bruno's notes were senior to Bruno's common stock, the Bruno's notes would be a covered security under § 77r(b)(1)(C).

However, Huff argues that at the time Huff began to purchase the Bruno's notes it was not a covered security because Bruno's common stock was no longer listed on the NASDAQ stock exchange. Thus, Huff's argument is that while the Bruno's notes could be considered a covered security when the Bruno's common stock was listed on the NASDAQ stock exchange, the Bruno's notes, at the time Huff purchased them, were not a covered security because Huff purchased the Bruno's notes after Bruno's common stock was removed from the list of stocks on the NASDAQ stock exchange on August 18, 1995. However, Huff's argument fails because § 78bb(f)(5)(E) states that the time it is determined whether a security is a "covered security" is "at the time during which it is alleged

that the misrepresentation, omission, or manipulative or deceptive conduct occurred." The majority of the allegedly wrongful conduct by BT Securities occurred before the Bruno's common stock was removed from the NASDAQ stock exchange on August 18, 1995. While Huff did not purchase the Bruno's notes until November 1995, Huff states in its complaint that "in reliance on the Prospectus and other disclosures made by the defendants" it purchased the Bruno's notes. Because Huff's complaint acknowledges that it purchased the notes in reliance upon the prospectus, which was dated August 10, 1995, and upon other representations, occurring before its decision to purchase the stock in November, the majority of those events occurred while Bruno's common stock was listed on the NASDAQ stock exchange. Thus, because the allegedly wrongful conduct occurred while the Bruno's common stock was listed, Bruno's common stock qualifies as a covered security pursuant to 15 U.S.C. § 77r(b)(1) and the Bruno's notes would also be considered a covered security under 15 U.S.C. § 77r(b)(1)(C).

It does not appear from the record that Huff raised this argument previously in this action or in *Huff I*, because the district courts in both cases decided the question of **SLUSA** preemption, which would have been unnecessary had either court determined that the Bruno's notes were not covered securities. *See Huff I*, 234 F.Supp.2d at 1219, and *Huff II*, 190 F.Supp.2d at 1274.

Preemption of Huff's Claims

In this case, the circuit court denied BT Securities' motion to dismiss, finding that Huff's claims were not preempted by **SLUSA** because the alleged wrongful conduct occurred before the enactment of **SLUSA** in 1998. The circuit court reasoned that **SLUSA** did not apply retroactively to Huff's claims because the preemptive provisions of **SLUSA** "did not take effect until November 3, 1998," and "the conduct which serves as a basis for the action predated the enactment of the said amendments." Thus, the circuit court determined that "retroactive application [of **SLUSA**] in this case not only destroys a remedy but a right." The circuit court's conclusion is consistent with the federal district court's conclusion in this case before its remand of the case to the state court. *See Huff II*, 190 F.Supp.2d at 1274.

However, the circuit court's findings in this case directly conflict with the findings made by the federal district court in *Huff I*. *See Huff I*, 234 F.Supp.2d at 1219. In *Huff I*, the district concluded that Huff's claims were preempted because **SLUSA** applied retroactively to its claims and that retroactive application of **SLUSA** did not "impair Huff's substantive rights to pursue its claims: **SLUSA** merely requires that Huff proceed in federal court under federal law if Huff and its customers elect to pursue their claims in a form that qualifies as a covered class action." *Huff I*, 234 F.Supp.2d at 1225. The district court reasoned:

> "[W]hen Congress enacted **SLUSA** on November 3, 1998, it gave notice to Huff that representative state law claims were eliminated. At that time Huff could have filed an action in federal court under federal law, but chose to wait until August 4, 1999, to assert state law fraudulent transfer claims against [Kohlberg] .... Huff made a distinct tactical choice in attempting to bring state law claims against [Kohlberg]. Any consequences that follow from such a choice are attributable to Huff's desire to invoke a particular mode of procedure and do not constitute an abrogation of Huff's substantive rights."

Huff I, 234 F.Supp.2d at 1225.

Since the federal district court's decision to remand the case in *Huff II* based on the district court's conclusion that Huff's claims were not preempted by **SLUSA**, a number of courts have held that **SLUSA** applies to actions filed after the enactment of **SLUSA** on November 3, 1998, that involved pre-enactment conduct. Those courts reasoned that **SLUSA** does not involve a substantive right, but a mode of procedure. *See, e.g., Huff I*, 234 F.Supp.2d at 1226 ("**SLUSA** applies retroactively to actions filed subsequent to enactment based on pre-enactment conduct"); *Gray v. Seaboard Sec., Inc.*, 241 F.Supp.2d 213, 218 (N.D.N.Y.2003) ("Plaintiffs' lawsuit in this case was filed in August of 2002, well after the enactment of **SLUSA**. While some of the conduct complained of in the instant action predates

SLUSA's enactment, the weight of authority suggests that the relevant conduct is the filing of the lawsuit, not the conduct allegedly giving rise to liability. Accordingly, the Court find[s] that this case does not raise any retroactivity concerns and that **SLUSA** therefore applies to this present action." (footnote omitted)); *In re BankAmerica Corp. Sec. Litig.*, 95 F.Supp.2d 1044, 1046 n. 2 (E.D.Mo.2000) (stating that **SLUSA** "does not apply to suits filed prior to November 3, 1998, the effective date of [**SLUSA**]);" *In re Enron Corp. Sec., Derivative & "Erisa" Litig.*, No. MDL-1446 (S.D.Tex., Aug. 16, 2002) (not published in F.Supp.) ("**SLUSA** exemplifies a rule of procedure that regulates secondary rather than primary conduct, the plaintiff's filing and prosecution of the litigation, as opposed to the defendant's allegedly unlawful conduct. Liability under the statute is based on the same kind of activities by a defendant as existed before **SLUSA**'s enactment. What **SLUSA** eliminates is a state-court forum for class actions arising from securities violations under state law pursuant to Congress' right, under the Supremacy Clause, to impose uniform and stringent pleading standards in such suits in an effort to eliminate abusive litigation and to prevent plaintiffs from evading the protections of federal law.").

The United States Court of Appeals for the Eighth Circuit recently addressed the application of **SLUSA** to conduct occurring before its enactment:

> "The mere fact that the challenged conduct occurred before the statute's

> enactment does not mean the statute operates retroactively .... *Landgraf v. USI Film Prods.*, 511 U.S. 244 , 269, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994). There is generally no retroactivity concern when a new procedural rule goes into effect after a cause of action accrues, but before filing of a lawsuit based on pre-enactment conduct. *Id.* at 275, 114 S.Ct. 1483. 'Because rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule [is] instituted after the conduct giving rise to the suit does not make application of the rule [] retroactive.' *Id.*"

See Professional Mgmt. Assocs., Inc. Employees' Profit Sharing Plan v. KPMG, LLP, 335 F.3d 800, 803 (8th Cir.2003). The Eighth Circuit Court of Appeals then held that "**SLUSA** applies to all actions commenced after its enactment, even if the challenged conduct predates **SLUSA**," *id.*, and cited *Huff I.*

Based on the foregoing decisions, we conclude that Huff's ability to bring a covered class action is a matter of procedure, not a substantive right; therefore, we hold that **SLUSA** applies to and preempts Huff's claims. [FN1]

Conclusion

Because Huff's claims are preempted by **SLUSA**, the circuit court erred in denying BT Securities' motion to dismiss. Therefore, we reverse the circuit court's order denying BT

Securities' motion to dismiss and render a judgment for BT Securities dismissing Huff's state-court action.

REVERSED AND JUDGMENT RENDERED.

HOUSTON, BROWN, HARWOOD, and STUART, JJ., concur.

> FN1. This Court is not bound by the district court's decision to remand *Huff II* to the state court. *See In re Loudermilch*, 158 F.3d 1143, 1146 (11th Cir.1998) ("[A] district court's decision on the motion to remand has no preclusive effect on the state court's resolution of respondents' preemption defense in the same case.").

2004 WL 818852, 2004 WL 818852 (Ala.)

END OF DOCUMENT

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

W.R. HUFF ASSET MANAGEMENT CO., LLC, as investment advisor and as attorney-in-fact on behalf of certain Beneficial Owners of 10 1/2% Senior Subordinated Notes;	)
Plaintiff,	)
vs.	)
BT SECURITIES, CORPORATION, a subsidiary of Deutche Banc Alex Brown, Inc., a Delaware corporation, CHASE MANHATTAN CORPORATION, INC., a Delaware Corporation, as successor-in-interest to Chemical Securities, Inc. a subsidiary of Chase Manhattan Corporation, a Delaware corporation; SALOMON BROTHERS, INC. a subsidiary of Salomon Smith Barney Holdings, Inc., which is owned by Citigroup, Inc., a Delaware corporation; DELOITTE & TOUCHE, LLP, a	) **CIVIL ACTION NO.** _____

Delaware limited partnership;)
ARTHUR ANDERSEN, LLP, a)
Delaware limited partnership;)
AND DEFENDANTS A-F,)
)
Defendants.)
)

NOTICE OF REMOVAL

Please take notice that Defendants BT Securities Corporation, now DB Alex. Brown LLC, The Chase Manhattan Bank, Salomon Brothers, Inc., Deloitte & Touche LLP and Arthur Andersen, LLP, through their undersigned counsel, have removed this cause to the United States District Court for the Northern District of Alabama, Southern Division pursuant to the provisions of the Securities Litigation Uniform Standards Act of 1998, Section 16(c) of the Securities Act of 1933, as amended, 15 U.S.C. § 77p(c), and Section 28(f)(2) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. § 78bb(f)(2). The grounds for removal are as follows:

1. On April 28, 2000, a civil action was filed in the Circuit Court of Jefferson County, Alabama entitled *W.R. Huff Asset Management Co., LLC, as investment advisor and as attorney-in-fact on behalf of certain Beneficial Owners of 10 1/2% Senior Subordinated Notes v. BT Securities, Corporation, Chase Manhattan Corporation, Inc., Salomon Brothers, Inc., Deloitte & Touche, LLP, [sic] and Arthur Andersen, LLP,* Case No. CV 2000 002630 00. Pursuant to 28 U.S.C. § 1446(a), true and correct copies of all

process, pleadings, orders and other papers filed and served in this action are attached hereto as Exhibit A.

2. Defendants, The Chase Manhattan Bank, Salomon Brothers, Inc. and Arthur Andersen, LLP, were served with the summons and complaint in this action (a copy of which is included as part of Exhibit A) on May 16, 2000, Defendant Deloitte & Touche LLP was served with the summons and complaint in this action on May 17, 2000, and Defendant BT Securities Corporation, was served with the summons and complaint in this action on May 19, 2000. This notice of removal is filed within thirty (30) days after receipt by Defendants The Chase Manhattan Bank, Salomon Brothers, Inc. and Arthur Andersen, LLP of a copy of the summons and complaint in this action and is therefore timely filed pursuant to 28 U.S.C. § 1446(b). *See Murphy Bros. v. Michetti Pipe Stringing, Inc.*, 526 U.S. ____, 119 S. Ct. 1322, 1328-29, 143 L. Ed. 448, 459 (1999).

3. Pursuant to 28 U.S.C. § 1446(d), concurrently with the filing of this notice of removal, defendants have served written notice thereof on all adverse parties and have filed a copy of this notice with the Clerk of the Circuit Court of Jefferson County, Alabama, from which this case was removed.

4. The Securities Litigation Uniform Standards Act of 1998 ("Uniform Standards Act" or "Act" provides for exclusive jurisdiction in federal court for virtually all securities class

action lawsuits. The Act authorizes the removal of any (1) "covered class action," (2) based on state law, (3) that alleges an untrue statement or omission of material fact in connection with the purchase or sale," (4) of a "covered security." The Act is codified as Section 16(b)-(f) of the Securities Act of 1933, as amended, and Section 28(f) of the Securities Exchange Act of 1934, as amended. See 15 U.S.C. § 77(p(c);15 U.S.C. § 78bb(f)(2).

5. First, plaintiff's complaint qualifies as a "covered class action" for purposes of the Uniform Standards Act. The complaint alleges that the plaintiff, W.R. Huff Asset Management Co., LLC ("Huff") is "bringing this lawsuit on behalf of its beneficial owner clients" and that Huff "acts in its capacity as investment manager and as attorney-in-fact for certain clients ("Beneficial Owners") who have held in excess of $290,000,000 in principal amount of 10 1/2% Senior Subordinated Notes due 2005 ("Notes") which were publicly offered by Bruno's, Inc. ("Bruno's" or "Company") in August 1995 pursuant to registration under the Securities Act of 1933." Complaint, ¶ 8-9. Huff also alleges that it is "bringing these claims in its individual capacity as a person defrauded by Defendants." Complaint, ¶ 15. Therefore, based upon the plaintiff's allegations, this action is a "covered class action" as defined in Section 16(f)(2) of the Securities Act of 1933, as amended, 15 U.S.C. § 77p(f)(2) and Section 28(f)(5)(B) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. § 78bb(f)(5)(B), in that it is a lawsuit in which (1) damages are sought on behalf of more than 50 persons or prospective class members, and

questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons; or (2) one or more named parties seeks to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons predominate over any questions affecting only individual persons.

6. Second, Huff's purported causes of action are based entirely on state law. The complaint alleges causes of action for (1) fraudulent suppression "as defined by Ala. Code §§ 6-5-100 and 6-5-102 (1975)" (Complaint, ¶¶ 231,233); (2) fraud "as defined by Ala. Code §§ 6-5-100 and 6-5-101 (1975)" (Complaint ¶ 249); (3) fraudulent and reckless deceit "as defined by Ala. Code §§ 6-5-103 and 6-5-104 (1975)" (Complaint, ¶ 267); (4) violations of the Alabama Securities Act, Ala. Code § 8-6-17 (Complaint, ¶ 275); (5) negligent misrepresentation (Complaint ¶¶ 283-358); (6) civil conspiracy (Complaint ¶¶ 359-368); and (7) aiding and abetting (Complaint, ¶ 369-377). These alleged causes of action are "based upon the statutory or common law of [a] State" – here, Alabama – and cannot "be maintained in any State or Federal court" under the Uniform Standards Act. 15 U.S.C. § 77p(b); 15 U.S.C. § 78bb(f)(1).

7. Third, the Notes constitute a "covered security" as specified in the Act, 15 U.S.C. § 77r(b) at the time during which it is alleged that the misrepresentations, omissions and manipulative and deceptive conduct alleged by Huff in the complaint occurred. During the period from 1995 to date, the common stock of Bruno's, Inc. has been listed or authorized for listing on the National Market System of the Nasdaq Stock Market. The Notes are a bond, debenture, note or similar obligation or instrument constituting a security and evidencing indebtedness and are a security of Bruno's, Inc. that is a senior security to the common stock of Bruno's, Inc. As a result, the Notes constitute "covered securities" under the provisions of Section 16(f)(3) of the Securities Act of 1933, 15 U.S.C. § 77p(f)(3) and Section 28(f)(5)(E) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb(f)(5)(E).

8. Finally, Huff alleges fraud by the defendants "in connection with" its purchase of the Notes. Huff alleges that "Defendants' personal egregious conduct caused substantial harm to Huff in connection with its purchase and retention of over $290 million of Notes." Complaint, ¶ 228 (emphasis added). See also Complaint ¶ 248 ("Huff acted upon and relied on these Material Representation and Omissions to its detriment by, *inter alia*, deciding to purchase, retain, or sell the Notes and/or deciding whether to take other action to which [*sic*] Huff was entitled to take."); Complaint, ¶ 266 ("Huff acted upon and justifiably and reasonably relied on the Defendants' Material Representations and

Omissions and deceit to its detriment by deciding to purchase, retain, or sell the Notes and/or deciding to take other action to which Huff was entitled."); Complaint, ¶ 273 ("The Defendants made Material Representations and Omissions during the relevant time period in connection with the offer, sale, or purchase of the Notes . . ."). Accordingly, Huff alleges "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security" or that the defendants "used or employed [a] manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security" as set forth in the Uniform Standards Act, 15 U.S.C. § 77p(b), 15 U.S.C. § 78bb(f)(1).

9. All properly-served defendants consent to and join in this Notice of Removal.

10. Based upon the preceding facts and allegations, this Court has subject matter jurisdiction of this action and this action is properly removable to this Court pursuant to Section 16(c) of the Securities Act of 1933, as amended, 15 U.S.C. 77p(c) and Section 28(f)(2) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. § 78bb(f)(2), because this case is a "covered class action based upon the statutory or common law of [a] State ... alleging ... a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security" or that "the defendant[s] used or employed [a] manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security."

WHEREFORE, Defendants BT Securities Corporation, The Chase Manhattan Bank, Salomon Brothers, Inc., Deloitte & Touche LLP and Arthur Andersen, LLP pray that the above described action pending in the Circuit Court of Jefferson County, Alabama, be removed to this Court.

Dated: June 13, 2000.

Respectfully Submitted,

/s/ Don B. Long, Jr.
Don B. Long, Jr.

/s/ Clark R. Hammond
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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Notice of Removal by placing copies of the same in the United States mail, postage prepaid, properly addressed to the following, this the 13th day of June, 2000:

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J. Timothy Francis
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_____
Of Counsel

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

W.R. HUFF ASSET MANAGEMENT CO., L.L.C.,	)	
Plaintiff,	)	
v.	)	Civil Action No. 00-AR-1630-S
BT SECURITIES CORPORATION, et al.,	)	
Defendants.	)	

MEMORANDUM OPINION

Before this court is plaintiff's motion to remand. Plaintiff, W.R. Huff Asset Management Co., L.L.C. ("Huff"), originally filed this action in state court under various state law theories. Essentially, Huff alleges that defendants engaged in fraud and misrepresentation in connection with Huff's purchase of certain securities. On June 13, 2000, defendants filed a notice of removal based upon alleged preemption of the state law claims by the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). On June 19, 2000 defendants filed a motion to dismiss Huff's complaint. On June 20, 2000, Huff filed a motion to remand. This court heard oral argument on both motions at its regular motion docket on June 23, 2000. Because both sides

wanted to fully brief the issues, this court provided them a briefing schedule. After all the briefs were filed, lead counsel for Huff requested further oral argument. Because counsel had not been available for the June 23, 2000 motion docket as a result of surgery, and because the questions in this case are both novel and important, this court again heard oral argument on August 11, 2000.

For the reasons set forth in the following opinion, the court will deny Huff's motion to remand. However, as explained in the order accompanying this memorandum opinion, the court will allow plaintiff an opportunity to seek an appeal of the denial of its motion to remand under 28 U.S.C. § 1292 (b). The court will not rule on defendants' motion to dismiss until a response is obtained from the Eleventh Circuit on this courts' removal jurisdiction. This court would prefer not to rule dispositively until it knows whether or not it has jurisdiction.

General Overview of SLUSA

Congress passed the Private Securities Litigation Reform Act ("PSLRA") in 1995. The goal of the PSLRA was to establish more stringent procedural requirements for private securities litigation in federal courts. Three years later, Congress passed SLUSA, Pub. L. No. 105-353, 112 Stat. 3227 (1998), after determining that plaintiff's attorneys were attempting to circumvent the PSLRA's tougher requirements by filing securities lawsuits under various state law theories in the state courts. SLUSA was expressly

designed to completely preempt all ""covered class actions" (as defined by SLUSA itself and not Rule 23, Fed. R. Civ. P.) filed in state courts and in which fraud or misrepresentation is alleged under state law in connection with the sale of a "covered security."

SLUSA states: "Any covered class action brought in any State court, involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b)." 112 Stat. at 3228. Defendants argue that this language makes it clear that SLUSA preempts Huff's state law claims. Huff argues that SLUSA does not preempt Huff's state law claims and, accordingly, that this court does not have jurisdiction. Huff gives two reasons for this: (1) that because the alleged misrepresentations and fraud occurred before SLUSA was passed, SLUSA does not apply to pre-enactment conduct; and (2) that even if SLUSA applies retroactively, this court does not have jurisdiction because the securities in question were not "covered securities" as defined by SLUSA.

Factual Background and Procedural History

Huff is a money manager and investment advisor for numerous clients. After the common stock of Bruno's, Inc., was delisted in November 1995, Huff began purchasing certain Senior Subordinated Notes for its clients. These Notes were issued on August 18, 1995 in connection with the takeover of Bruno's by Kohlberg Kravis

Roberts & Co.("KKR") through a leveraged recapitalization. Huff alleges that defendants made material misstatements in connection with the sale of the Notes, and that defendants continued to make material misstatements and omissions in various periodic public filings until Bruno's declared bankruptcy on February 2, 1998.

On April 28, 2000, Huff filed a complaint in the Circuit Court of Jefferson County, making claims that Huff says arise solely under Alabama statutory and common law, including claims for fraudulent suppression, fraudulent and reckless misrepresentation, fraudulent and reckless deceit, negligent misrepresentation, civil conspiracy, and violations of the Alabama Securities Act.[1]

On June 13, 2000, defendants removed the case to this court, asserting that plaintiff's state law claims are preempted by Section 16(c) of the Securities Act and Section 28(f) (2) of the Securities Exchange Act, as amended by SLUSA.

Legal Questions and Analysis

Whether SLUSA Applies Retroactively

Huff cites the famous Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483 (1994), for the proposition that SLUSA does not apply to

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[1] Huff asserts that it did not discover the fraud until October of 1999. Defendant does not dispute this assertion, so there is no statute of limitations problem.

Huff's case because the complained of conduct occurred before SLUSA was passed, and therefore, that SLUSA cannot apply retroactively. This court respectfully disagrees. The precise holding of Landgraf is that absent a clear Congressional statement to the contrary, a statute is presumed not to apply retroactively to **cases that were pending** prior to the statute's enactment. In Landgraf, the Court made clear that its review was limited to the question of whether the 1991 amendments to the Civil Rights Act applied retroactively to **cases pending** when the amendments became law. Landgraf at 249-250, 1489. The Court concluded that the amendments should not be applied retroactively to **pending cases**. It pointed out that a prior version of the bill contained a provision that would have applied the new amendments to cases arising before its enactment, and this version was expressly rejected. Thus, the "narrow holding" of Landgraf is that the 1991 amendments did not apply to **pending cases** because there was no clear Congressional statement to the contrary.

Despite Landgraf's express holding, Huff argues that Landgraf should be read to prohibit the retroactive application of statutes to **conduct** that predated the statute. Huff's argument is not completely without merit. This court acknowledges that in Landgraf, the Supreme Court repeatedly refers to the law as it existed at the time of the discriminatory "**conduct**." At one point, the Court says, "Thus the controlling question is whether the Court of Appeals should have applied the law in effect at the time the discriminatory conduct occurred, or at the time of

its decision in 1992." Landgraf at 250, 1489. As a result, Huff can make a credible argument that the "broad holding," of Landgraf is that absent a clear Congressional statement to the contrary, statutes are presumed not to apply retroactively to **conduct** that occurred before the statute's enactment.

However, ultimately, this court finds that SLUSA does apply to this case for the following reasons. SLUSA itself states the following: "APPLICABILITY: The amendments made by this section shall not affect or apply to any action commenced before and pending on the date of enactment of this Act." 112 Stat. at 3233. This provision is a clear Congressional statement that SLUSA will not apply to any **pending cases**. The logical, if negative, implication of this applicability provision is that SLUSA **will** apply to any **cases** filed **after** the effective date of the Act, regardless of when the underlying **conduct** took place.[2] A case filed one day after the effective date of SLUSA would necessarily involve conduct that preceded the enactment. Therefore, based on the text of the statute, SLUSA applies to this case.

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[2] At oral argument, plaintiff's counsel suggested that because a **negative** implication must be made, the language is, by definition, ambiguous. The court finds this position untenable, and a simple example illustrates the point: If a mother were to tell her child, "You may not go outside before 2:00," the logical implication of that statement, although a **negative** implication, is that the child would be allowed to go outside after 2:00. No one would seriously contend that the mother's statement is ambiguous as to what time the child was allowed to go outside.

Furthermore, defendants cite to several cases in which the PLSRA was applied to cases filed after its enactment although the alleged conduct occurred before the PLSRA was enacted, and the applicability language in SLUSA is identical to the language in the PLSRA. For example, in Zeid v. Kimberley, 973 F.Supp. 910 (N.D. Cal. 1997), *reversed on other grounds*, the plaintiff argued that the PLSRA did not apply to pre-act conduct. In rejecting that argument, the court stated:

> The language [of the reform Act] means exactly what it says. The amendments contained in the Reform Act do not apply retroactively to pending actions. Rather, they apply prospectively to all actions . . . that are commenced after December 22, 1995. Since Plaintiffs filed their action on February 23, 1996, two months after the effective date, the Reform Act applied to their suit. Zeid at 914-915. Although not binding, the court finds Zeid persuasive.

Also, the Eleventh Circuit has stated, "Landgraf v. USI Film Products . . . provides the analytical framework for determining whether newly enacted statutory provisions are applicable to pending cases." Hunter v. United States, 101 F.3d 1565, 1569 (11th Cir. 1996) (en banc) (emphasis added). This statement is in accord with this court's conclusion, *supra*, that the **precise** holding of Landgraf is limited to **pending cases**.

Furthermore, even though some language in Landgraf refers to **conduct**, the case before

this court is different from the Landgraf case in several important respects. For example, in Landgraf, **both** the conduct and the filing of the suit occurred before the act was passed. And, most importantly, the Court's rationale for the presumption against retroactivity as to pending cases was that it is unfair to attach new liabilities to **conduct** that, **at the time**, was not subject to those liabilities. So, as it is in its Ex Post Facto jurisprudence, the Court was concerned about due process-namely, notice and the opportunity to conform one's conduct before new liabilities or punishments attach to that conduct. See Landgraf at 265-268, 1497-1498. But in the case before this court, that concern is not present. Defendants are not arguing that SLUSA should not apply to them because SLUSA unfairly and without notice attaches new liabilities to pre-enactment conduct.

In addition to the text of SLUSA, the purpose of SLUSA strongly supports its application to this case. Because SLUSA's purpose was not to add new liabilities to defendants' conduct in securities litigation, but to remedy apparent attempts by plaintiffs to circumvent the requirements of the PLSRA by filing suits under state laws in state courts, it would not make sense to decide the retroactivity question under SLUSA in favor of protecting plaintiffs' rights to bring state law claims in state courts.

Finally, Huff argues that the retroactive application of SLUSA will impair its rights that existed at the time of the alleged conduct. And

Landgraf does discuss whether rights would be impaired by the retroactive application of a statute. However, Landgraf makes it clear that a court only reaches the question of whether rights were impaired if there is no clear Congressional statement regarding retroactivity, and this court has determined that there **is** a clear Congressional statement in SLUSA. Furthermore, even if the language of SLUSA were ambiguous, this court agrees with defendants that there is no impairment of the rights of Huff or of the putative class it seeks to represent, because they are still free under SLUSA to bring individual actions in state court under any and all of Huff's present state law theories. The only thing they could not do is file a **class action** in state court. For the foregoing reasons, this court finds that SLUSA does apply "retroactively" to Huff's claims.

This court is not particularly enamored of the concept of federal preemption of traditional state law remedies. For instance, this court would be delighted if it is determined by a binding appellate court that Judge Holmes is correct in Lewis v. Aetna U.S. Healthcare, Inc., 78 F. Supp. 2d 1202 (N.D. Okla. 1999), so that it will be harder for insurers to tow their frauds into the federal harbor provided by ERISA preemption for the purpose of skuttling them. But, if Congress clearly decrees preemption in a particular area of controversy and has a constitutional basis for its enactment, preemption is the order of the day.

Whether the Securities at Issue Are Covered Securities Huff argues that even if there is no retroactivity problem, SLUSA still does not apply

presumptively to this case because the Notes at issue were not "covered securities" as defined by SLUSA. Huff asserts that the securities at issue could not have been "covered securities" because in 1995, when some of the alleged fraud took place, there was no existing definition of a "covered security." Huff points out that § 18 of the Securities Act of 1993 did not even define "covered security" until 1996 when the National Securities Markets Improvement Act of 1996 was enacted. However, the court finds that this argument is not plausible for the reasons that follow.

A covered security was originally defined as follows: "A security is a covered security if such security is- (A) listed, or authorized for listing, on the New York Stock Exchange or the American Stock Exchange, or listed on the National Market System of the NASDAQ Stock Market . . . . " 15 U.S.C. § 77(r)(b)(1). In 1998, SLUSA amended the definition of a "covered security" to add "authorized for listing" on the NASDAQ instead of just "listed" on the NASDAQ. SLUSA also states: "(3) COVERED SECURITY- The term 'covered security' means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 18(b) **at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred** . . . 112 Stat. at 3230 (emphasis added).

This court has already found that SLUSA applies to this case, and it is only logical to conclude that any definitions contained within

SLUSA must also apply. Accordingly, Huff's argument that there was no such thing as a "covered security" at the time of the alleged misrepresentations is erroneous, that is, unless this court's conclusion that SLUSA applies is erroneous. SLUSA states that the security must have been a covered security at the time during which the alleged fraud occurred, and (for the purposes of this case), SLUSA defines a "covered security" as a security that is either listed or authorized for listing on the NASDAQ. Therefore, the court must look to the timing of the alleged misrepresentations to determine whether the securities at issue were either listed or authorized for listing on the NASDAQ at the time of the misrepresentation.

Huff's complaint alleges:

> The Underwriter Defendants solicited [Huff] to purchase the Notes in early August 1995. The Underwriter Defendants engaged in solicitations by distributing a preliminary 'red herring' Prospectus to investment managers and analysts at Huff in early August 1995, and by inviting Huff to attend a road show in New York City. . . . Also, in early August 1995 and before the final Prospectus, dated August 10, 1995, the Underwriter Defendants and KKR solicited Huff by arranging a one-on-one meeting at Huff's Offices in Morristown, New Jersey.

(Compl. ¶ 2.) Huff's complaint also states that "Huff began its purchases of the Notes in

November 1995, approximately three months after the Leveraged Recapitalization, and in reliance on the Prospectus and other disclosures made by Defendants." (Compl. ¶ 3.) It is clear from this that the primary alleged misrepresentations occurred on or before August 10, 1995, because it is the prospectus and the representations allegedly made at the meeting before the prospectus was issued which Huff alleges it relied on in deciding to purchase the Notes in the first place.

Under SLUSA, Bruno's equity and debt instruments were in fact covered securities on or before August 10, 1995, because prior to August 21, 1995, Bruno's was actually listed on the NASDAQ.[3] Because the statute says that the appropriate time frame is the time when the material omissions or fraudulent statements were made, it is clear that much of the alleged fraud occurred when the stock was still listed on NASDAQ. Therefore, any alleged fraud that occurred before the delisting concerned "covered securities."

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[3] Plaintiff states that the delisting date was August 18, 1995. August 18 was a Friday and August 21 was a Monday. Given the fact that the stock market closes on Friday and opens on Monday, the court is not sure whether the stock was technically delisted at the close of business on Friday or the start of business on Monday. Regardless, this difference is not material to the court's determination of whether the stock at issue was a covered security because it is undisputed, based on Huff's complaint, that many if not most of the alleged material misrepresentations occurred prior to August 18.

Huff makes the following additional argument: **after** the delisting, the stock was no longer a "covered security," so any alleged fraud that occurred after the delisting is not covered by SLUSA. However, even if Huff is correct that some of the alleged fraud occurred after the securities were no longer even "authorized for listing,"[4] SLUSA still applies to this case because SLUSA provides:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private parties alleging an untrue statement or omission of material fact in connection with the purchase or sale of a covered security.

112 Stat. at 3228. The statute does not say that all allegations in a "covered class action" must involve "covered securities." It says that a class action may not be maintained in State or Federal court if the party is alleging "an untrue statement or omission of material fact in connection with the purchase or sale of a covered security." That is the case here. While it is true that some of the allegations of fraud occurred after the stock was delisted, many of them occurred while the stock

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[4] Because the court finds that SLUSA applies regardless of whether, after the delisting, the Notes continued to be "authorized for listing," the court expresses no opinion as to the question of whether the Notes were, in fact, still "authorized for listing." Huff remains free, of course to make that argument to the Eleventh Circuit at an appropriate time.

was a "covered security" by virtue of being listed on the NASDAQ. Therefore, the action alleges fraud in connection with the purchase or sale of a covered security, and therefore, SLUSA applies.

Huff's Other Arguments

In its brief, Huff argues that SLUSA does not apply because this action was not a covered class action and that SLUSA violates the Equal Protection Clause. Although Huff essentially conceded both of these arguments during oral argument, this court will nevertheless address them briefly in the interest of being comprehensive, and because of the promise of an interlocutory appeal by Huff from any denial of Huff's motion to remand.

Whether This Action is a Covered Class Action

SLUSA does not use Rule 23, Fed. R. Civ. P., to define a "class action." Rather, it has its own definitions. For example, section (f)(2)(A) defines a covered class action as

> (i) any single lawsuit in which—
> (I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

> (II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members (emphasis added).

112 Stat. at 3229.

In its brief, Huff argues that it is not covered by (f)(2)(A)(i)(I) because the class contains less than 50 persons or prospective class members, and Huff further offers to amend its complaint to make it clear that it is representing less than 50 persons or members. However, regardless of whether Huff is bringing this action on behalf of 49 clients or 200 clients, this action is still a "covered class action" because it meets the alternative definition of a covered class action as outlined by subsection II.

As defendants point out, Huff's complaint states that it is "bringing these claims in its individual capacity as a person defrauded by Defendants," (compl. ¶ 15,) and that it is "bringing this lawsuit on behalf of its beneficial owner clients." (Compl. ¶ 14.) Thus, by the language of Huff's own complaint this case is clearly a "covered class action" under subsection

II,[5] and to the extent that Huff has not conceded the "covered class action" argument, that argument fails.

Huff could have avoided this removal if it had been willing to be the sole plaintiff.

Equal Protection

In portions of its briefs, Huff appears to be arguing that SLUSA violates the Equal Protection Clause because investors for whom it would be cost prohibitive to bring an individual lawsuit in state court are precluded from pursuing their state law claims, period, inasmuch as they are forced to be a part of a federal class that can sue only under SLUSA in federal court. But then Huff also states:

> The right of a defrauded small investor to bring a class action asserting claims based upon state law for common law fraud or deceit, or for violations of the state blue sky law act, is a fundamental right of access to the courts, requiring close scrutiny of any statute depriving some investors (but not others) of access to the courts.

(Huff's Mem. in Support of Mot. to Remand at 25) (emphasis added) Huff's argument, if the court understands it, is untenable for several reasons.

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[5] Huff's ancillary argument, that no common issues of law and fact predominate, is not credible based on the language of its own complaint and on the facts of this case.

First, there is no fundamental right to bring a state securities lawsuit on behalf of others, and this court cannot believe that the current United States Supreme Court would hold such. Second, individual investors are not precluded from bringing individual lawsuits in state court, so they are not being denied access to a court of law. The fact that it costs money to go to court is not a reason for holding that SLUSA violates the Equal Protection Clause. Finally, Huff's argument that SLUSA's preemption of state law claims violates a fundamental right to bring a claim under state law could be made about every federal law that completely preempts state law, and Huff has not cited to any cases in which the Supreme Court has held that a federal law, solely by virtue of its preemptive effect, violates the Equal Protection clause.[6]

Because there is no fundamental right involved, SLUSA only has to pass the "rational basis" test, and this court can see no reason why it does not. The wisdom of Congress is not a matter for this judge to judge. Huff does attempt to argue that there is no rational basis for allowing an action in state court if there are 50 or fewer members of the class while preempting the same action if there are more than 50 members. However, once again, Huff misses the alternative definition of a class action under SLUSA and furthermore, this court agrees with defendants

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[6] Although there is no indication that Huff is arguing that small investors are a suspect class, that argument would certainly fail under the Supreme Court's Equal Protection jurisprudence.

that there is nothing inherently irrational about the 51 plaintiff minimum. Class actions under Rule 23 involve a determination of numerosity, which is always to some degree, arbitrary. Likewise, Congress picked a number here. But an arbitrary selection of particular number does not equal an irrational selection. As defendants put it, "This kind of legislative line-drawing is commonplace and constitutionally sound." (Defs.' Supplemental Opp'n to Pl.'s Mot. to Remand at 22.) Therefore, Huff's Equal Protection argument, to the extent that Huff has not conceded it, fails.

Lastly, if there were a serious Constitutional attack on SLUSA itself, it would be necessary to notify the Solicitor General and to obtain from him the position of the United States on the constitutional question.

Conclusion

A separate and appropriate order will be entered.

DONE this 17th day of August, 2000.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT
JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-90029-J

W.R. HUFF ASSET MANAGEMENT, CO., L.L.C.,

Petitioner,

Versus

BT SECURITIES CORPORATION,
CHASE MANHATTAN CORPORATION, INC.,
SALOMON BROTHERS, INC.,
DELOITTE & TOUCHE, LLP,
ARTHUR ANDERSEN, LLP,
DEFENDANTS A-F,

Respondents.

Petition for Permission to Appeal an Order from the United States District Court for the Northern District of Alabama

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BEFORE: **EDMONDSON, MARCUS, and KRAVITCH, Circuit Judges.**

BY THE COURT:

The petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is DENIED.

APPENDIX E

United States District Court,
N.D. Alabama,
Southern Division.

W.R. HUFF ASSET MANAGEMENT CO., L.L.C., etc., Plaintiff,
v.
BT SECURITIES CORPORATION, et al., Defendants.

No. CIV.A.00-AR-1630-S.

May 22, 2001.

MEMORANDUM OPINION

ACKER, District Judge.

Procedural Background

Plaintiff, W.R. Huff Asset Management Co., L.L.C. ("Huff"), is an investment management company. It originally filed this action in state court for itself and on behalf of certain of its unnamed owner-clients. It proceeded under various state law theories. It alleged that defendants engaged in fraud and misrepresentation in connection with the sale of securities. It carefully avoided the slightest hint of reliance upon federal law. Defendants removed the case to this court, alleging super-preemption of Huff's state law claims by the Securities Litigation Uniform Standards act of 1998 ("SLUSA" or "the Act"), Pub.L.No. 105-353, 112

Stat. 3227 (1998). The "well-pleaded complaint" rule does not prevent federal question removal under 28 U.S.C. § 1331 if federal law so pervasively covers the field that a purported state cause of action cannot exist without, in reality, being nothing if not a federal claim. The provisions relevant to defendants' preemption theory are found in Title I of SLUSA, which amends Section 16 of the Securities Act of 1933 ("the Securities Act"), 15 U.S.C. § 77p, and Section 28 of the Securities Exchange Act of 1934 ("the Exchange Act"), 15 U.S.C. § 78bb. Because § 101(a) of SLUSA, which amends the Securities Act, is materially identical to § 101(b), which amends the Exchange Act, it provides the means by which a federal court can ascertain whether it has jurisdiction.

In its opinion of August 17, 2000, this court concluded that SLUSA was Huff's exclusive avenue for relief, found the existence of a federal question, and therefore denied Huff's motion to remand. However, the court expressly encouraged Huff to request the Eleventh Circuit to accept an appeal under 28 U.S.C. § 1292(b). This court reasoned that an interlocutory expression by the Eleventh Circuit on this court's subject matter jurisdiction would advance the ultimate termination of this litigation and would minimize the likelihood of a waste of judicial resources. The Eleventh Circuit rejected Huff's attempt at an appeal. This provoked the three motions by Huff now pending in this court: 1) motion to reconsider the August 17 opinion, 2) alternative motion to sever and remand the case as to one defendant, Deloitte & Touche, LLP

("Deloitte"), and 3) alternative motion for leave to amend the complaint. Defendants have filed a motion to dismiss and their own motion to amend the opinion of August 17.

The Eleventh Circuit's decision not to decide the question of jurisdiction constitutes a reminder to this court of its obligation under 28 U.S.C. § 1447(c) to constantly examine and reexamine its own jurisdiction.

This obligation is ever present, without regard to Huff's motion for reconsideration. Simply, § 1447(c) requires a federal court to remand an action removed to it if subject matter jurisdiction is lacking, unless and until that lack of jurisdiction only appears after a final judgment has been entered. Accordingly, this court takes a second look at its jurisdiction. For reasons the court will now elaborate, it finds that it does not have jurisdiction. In other words, a new look is about to result in a different outcome.

If this court did have jurisdiction, the case would be over, because defendants' argument for removal jurisdiction is based on 15 U.S.C. & 77p(c) which is identical to, and goes hand in hand with, 15 U.S.C. § 77y(b) which would require dismissal. If the former is satisfied, so is the latter. Because the court now finds that SLUSA does not apply because the Act does not apply retroactively, this court cannot do anything except to remand the case. It remains to be seen what the Circuit Court of Jefferson County, Alabama, the forum properly chosen by Huff, will do with the case. This court concentrates only

upon the obligation created by 28 U.S.C. § 1447(c), which is unambiguous, even if, from time to time, it calls for a change of mind.

Discussion

If SLUSA is not to be applied retroactively to conduct predating its enactment, SLUSA does not preempt Huff's state law claims, and there is no federal question upon which defendants can invoke the removal jurisdiction of this court

The court takes a deeper look into whether applying SLUSA to Huffs complaint would be "retrospective", so as to implicate the *Landgraf* retroactivity analysis, as elaborated in subsequent Supreme Court decisions. *Landeraf v. USI Film Prod.*, 511 U.S. 244, 280, 114 S.Ct. 1483, 1505, 128 L.Ed.2d 229 (1994); *see Martin v. Hadix*, 527 U.S. 343, 119 S.Ct. 1998, 144 L.Ed.2d 347 (1999); *Lindh v. Murphy*, 521 U.S. 320,117 S.Ct. 2059,138 L.Ed.2d 481 (1997); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 117 S.Ct. 1871.138 L.Ed.2d 135. (1997). Huff points out that all of defendants' acts and omissions that form the basis of claimed liability occurred prior to SLUSA's enactment on November 3, 1998. Huff did not file its complaint until April 28, 2000. In other words, although the case was not filed until after SLUSA became the law of the land, the conduct complained of predated the enactment. On the basis of references to "pending cases" in *Landgraf* and some of its progeny, *see, e.g., Martin*, 527 U.S. at 352,119 S.Ct. 1998, 144 L.Ed.2d 347; *Landgraf*, 511 U.S. at 249-50, 114

S.Ct. 1483, 128 L.Ed.2d 229; *Hunter v. United States*, 101 F.3d 1565, 1569 (11th Cir. 1996) (en banc), the argument is made that the protection recognized by *Landgraf* against unfair retrospective application should be limited to those actions in which the complaint was filed prior to enactment of the law proscribing the conduct. However, upon reflection, the court concludes that the *Landgraf* limitation cannot be reconciled with *Hughes Aircraft*, in which the plaintiff filed suit in 1989, but premised liability on a 1986 amendment to the Fair Claims Act, saying that it should be applied to the defendant's pre-1986 conduct. *See Hughes Aircraft*, 520 U.S. at 941-45, 117 S.Ct. 1871, 138 L.Ed.2d 135. Even though the *Landgraf* complaint was pending at the time of the statutory enactment at issue there, the unanimous *Hughes Aircraft* Court employed the *Landgraf* analysis, without commenting on the obvious feature that distinguishes the two cases, and concluded that the 1986 amendment could not be applied retroactively. *See Hughes Aircraft*, 520 U.S. at 945-51, 117 S.Ct. 1871, 138 L.Ed.2d 135. In so doing, the Supreme Court reaffirmed the fact that *Landgraf* focuses on conduct as the central fact for determining retroactivity. *See, e.g., Landgraf*, 511 U.S. at 250, 114 S.Ct. 1483, 128 L.Ed.2d 229. Moreover, given the purpose for a presumption against retroactivity, as discussed in *Landgraf*, 511 U.S. at 265-73, 114 S.Ct. 1483, 128 L.Ed.2d 229, there is nothing within the logic of *Landgraf* that can explain why a court should not apply that presumption equally to a case pending as to a case not pending on the date of a statute's enactment, as long as pre-enactment

conduct forms the basis for liability. No matter which comes first, the enactment or the filing, the application of a statute may be precluded on the basis of impermissible retroactivity, either as a matter of statutory construction or as a matter of the constitutional guarantee of "due process". Huff's complaint raises the overarching concern over SLUSA retroactivity when it relies upon defendants' actionable conduct that occurred prior to SLUSA's enactment.

In order to decide whether SLUSA covers defendants' conduct, the first question to be answered is whether Congress expressly described the statute's temporal reach. *See Martin*, 527 U.S. at 352, 119 S.Ct. 1998, 144 L.Ed.2d 347 (citing *Landgraf*, 511 U.S. at 280, 114 S.Ct. 1483, 128 L.Ed.2d 229). A court must follow explicit and unambiguous congressional instruction, unless the clear intent is overridden by some constitutional prohibition. *See Landgraf*, 511 U.S. at 266-72, 280, 114 S.Ct. 1483, 128 L.Ed.2d 229. If there is no statutory prescription, the court must determine whether retrospective application would have an impermissible "retroactive effect". See *id.* SLUSA's applicability provision, which covers § 101(a) and § 101(b), states: "The amendments made by this section shall not affect or apply to any action commenced before and pending on the date of enactment of this Act." § 101(c), 112 Stat. at 3233. Subsection 101(c), then, amounts to an express proscription that forbids the application of SLUSA to any case pending on the day SLUSA came into force. However, to the degree it establishes the Act's temporal reach, such a prescription must be

inferred. It is certainly not express except as to pending cases. Based on the statutory maxim that the expression of one thing is the exclusion of another, the inference can be drawn from the language of SLUSA's applicability provision that the Act does apply to all cases brought after enactment, whether or not based on pre-enactment conduct. Because it cannot be said that § 101(c) expressly prescribes the temporal reach of SLUSA, it falls short of the standard established by the Supreme Court for accomplishing retroactivity as to pre-enactment conduct by unequivocal statutory language.

This court's ultimate finding of no retroactivity is not based just upon the definitional distinction occasioned by the one-letter difference between "prescribe" and "proscribe". The Supreme Court's discussion of what the "clear statement rule" means in practice leaves no doubt that § 101(c) fails as a purported manifestation of congressional intent for retrospective application in this case. The potential for elementary unfairness that plagues retrospective application has long justified the Supreme Court's stance that Congress, if retroactivity is to be achieved, must show that it "has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness" by providing a loud and clear signal that a statute takes effect from a time anterior to its passage. *Landgraf*, 511 U.S. at 268,114 S.Ct. 1483,128 L.Ed.2d 229; *see Lindh*, 521 U.S. at 325-26, 328, n. 4, 117 S.Ct. 2059, 138 L.Ed.2d 481. The Landgraf Court cited an example of a congressional expression that would have passed retroactive muster: "[T]he new

provisions shall apply to all proceedings pending on or commenced after the date of enactment of this Act." 511 U.S. at 260, 114 S.Ct. 1483, 128 L.Ed.2d 229 (emphasis added; internal quotation marks omitted); *see Martin*, 527 U.S. at 354-55, 119 S.Ct. 1998 (quoting *Landgraf's* illustration). The words of § 101(c), namely, "The amendments made by this section shall not affect or apply to any action commenced before and pending on the date of enactment of this Act" (emphasis added), do not come close to taking the Supreme Court's advice on draftsmanship. 112 Stat. at 3233. Assuming that *Landgraf's* hypothetical provision would suffice, the absence of similarly absolute language for retrospective application in § 101(c) distinguishes SLUSA's applicability provision. *See Lindh*, 521 U.S. at 328 n. 4, 117 S.Ct. 2059, 138 L.Ed.2d 481. Moreover, the suppositional example provided in *Landgraf* shows that express language for a retrospective application of SLUSA to actions filed post-enactment could have effortlessly been added to § 101(c). Therefore, § 101(c) fails as an expression of legislative intent to override the presumption against retrospective application. This court respectfully disagrees with *In re BankAmerica Corp. Sec. Litig.*, 95 F.Supp.2d 1044, 1046 n. 2 (E.D.Mo.2000), in which that court concluded that § 101(c) prevents retrospective application of SLUSA only as to cases filed pre-enactment. The difference of opinion between this court and the Eastern District of Missouri means only that this court had good reason to certify the jurisdictional question for interlocutory review.

The use of negative inference in *Lindh* to determine the temporal reach of a federal statute does not alter this court's conclusion. In *Lindh*, from the presence of explicit language in only one of two substantively similar and simultaneously enacted chapters in the Antiterrorism and Effective Death Penalty Act, making that chapter applicable to pending cases, the Supreme Court inferred that the other chapter was not meant to apply to pending cases. 521 U.S. at 326-30, 117 S.Ct. 2059, 138 L.Ed.2d 481. However, the *Lindh* Court used negative inference to find that the statutory provision applied prospectively; here, using negative inference to divine congressional intent would result in retrospective application. Because prospective application does not carry the long-recognized, powerful potential for unfairness that is inherent in retrospective application, *see Landgraf*, 511 U.S. at 265-73, 114 S.Ct. 1483, 128 L.Ed.2d 229, the Supreme Court does not require that Congress be express in manifesting its intention that a statute apply prospectively only. Negative inference, therefore, can be an appropriate means for determining congressional intent for prospective application; however, this does not mean that negative inference provides a backdoor way around the need for an express legislative command in order to acquire retrospective application. *See Lindh*, 521 U.S. at 325-29, 117 S.Ct. 2059, 138 L.Ed.2d 481. [FN1] Thus, from § 101(c), it can easily be inferred that the temporal reach of SLUSA covers actions initiated post-enactment. However, if applying the relevant SLUSA provisions to a particular case would have a retroactive effect, unless there is clear congressional intent to give it

that effect, it cannot be applied to pre-enactment conduct.

> FN 1. Indication to the contrary in *Mayers v. Reno*, 175 F.3d 1289, 1302-1303 (llth Cir. 1999) is dictum. The court in *Mayers*, like the Supreme Court in *Lindh*, used negative inference to find congressional intent for prospective application only. Furthermore, any persuasiveness of statements in *Mayers* on this issue is undercut by *Martin's* subsequent re-affirmation of the requirements and role of the clear statement rule. 527 U.S. at 353-54, 119 S.Ct. 1998, 144 L.Ed.2d 347.

Having found that there is no clear, controlling statutory language in SLUSA, the court explores whether applying SLUSA to the conduct complained of is impermissible for reasons of constitutional proportion, or of public policy. The *Landgraf* Court held that a statute would not be allowed to have retroactive effect if applying it "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." 511 U.S. at 280, 114 S.Ct. 1483, 128 L.Ed.2d 229. A court should rely on "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.*, at 270, 511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229.

The statute that this court is checking out for possible retroactive effect is 15 U.S.C. § 77(t)(c) entitled "Removal of covered class actions", which provides: "Any covered class action brought in

any State court, involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b)." As alluded to *supra* in the discussion of the procedural posture of this case, subsection (b) compels a dismissal of actions based on state law if they allege fraud, deception, or misrepresentation regarding the purchase or sale of securities traded, or authorized to be traded, nationally. 15 U.S.C. § 77p(b). If applicable, § 77p(c) does two things, 1) permits removal of a state action, and 2) sinks the state ship once in the federal harbor. This is the classic sequence of events in ERISA preemption removals. The first consequence, if severed from the second, usually does not raise concerns because a removal opportunity achieved retroactively is not so shocking. *See, e.g., Hughes Aircraft*, 520 U.S. at 950-51, 117 S.Ct. 1871, 138 L.Ed.2d 135. Whether § 77p(c) does or does not raise such concerns need not be decided, because SLUSA dictates that each of the two consequences not be looked at in isolation from the other. The plain language of SLUSA shows that Congress contemplated that removal would be obtainable only if subsequent dismissal follows. Thus, the two steps were clearly intended to operate in tandem. [FN2] SLUSA makes ERISA look like a good friend to those who want to pursue their state law remedies in state court. The appropriate level of analysis limits the examination to § 77p(c) itself, not to its conjoined subparts, and the whole provision must be devoid of retroactive effect in order for any portion of it to withstand scrutiny in the present procedural

context. If dismissal is not mandated in order to avoid impermissibly placing a retroactive encumbrance on Huff, the entire provision, including its grant of removal jurisdiction, cannot apply. If this is a conundrum, it is one of Congress's making and not one this court made up.

> FN2. Beyond the issue of congressional intent that any removal under § 77p(c) be coupled with dismissal, to determine the retroactive effect of a portion of the provision independently of the other would risk the creation of a questionable state of affairs. If consideration of the applicability of the provision's jurisdictional grant was severed from that of the dismissibility aspect of the provision, and the former was not found to have retroactive effect, but the latter was so found, Huff's complaint, entirely based on state law on its face, would be removable under federal law, but not preempted by federal law. This anomaly is otherwise avoided in SLUSA, which does allow a federal district court to entertain certain actions founded on state law. 15 U.S.C. § 77p(d). If those actions get into federal court via removal, that court must remand. 15 U.S.C. § 77p(d)(4). None of these exceptions apply here.

Subsection 77p(c), by incorporating § 77p(b), requires the dismissal of some, but not all, actions sounding in state law and essentially alleging fraud in connection with the sale of

certain securities. Because the preemptive effect is limited to "covered class actions" as defined in 15 U.S.C. § 77p(f)(2)(A), § 77p(c) may be characterized, in a sense, as procedural. However, labeling a rule as "procedural" does not end the inquiry. In *Landgraf*, the Supreme Court "took pains to dispel the 'sugges[tion] that concerns about retroactivity have no application to procedural rules." *Martin*, 527 U.S. at 359, 119 S.Ct. 1998, 144 L.Ed.2d 347 (quoting *Landgraf* 511 U.S. at 275 n. 29, 114 S.Ct. 1483, 128 L.Ed.2d 229). In keeping with the functional approach, this court must look at the practical procedural restrictions resulting from the application of the term "covered class action". The Act defines it as:

> (i) any single lawsuit in which--
> (I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or
> (II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

> (ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which--
> (I) damages are sought on behalf of more than 50 persons; and
> (II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

15 U.S.C. § 77p(f)(2)(A). Thus, the question is whether SLUSA, if it denies Huff and its unnamed party-clients the use of the various incarnations of "covered class action" as they seek to recover for injuries caused by defendants' alleged violations of state law, is also denying them procedural rights that cannot be retrospectively yanked from under them without running afoul of the notions of "fair notice", "reasonable reliance", and "settled expectations".

In opposition to Huff's motion to remand, defendants have persuasively argued that the plain language of the definition establishes that the present group action led by Huff falls under § 77(p)(f)(2)(A)(i)(II). Huff brought suit on a representative basis seeking damages not only for itself but for the "owner-clients" for whom it was purportedly acting as investment manager and attorney-in-fact. Compl. ¶ 14-16. In its submissions, Huff has sought to slip the noose of this statutory provision by asserting that common questions of law or fact do not predominate as between it and the unnamed parties or as among the unnamed parties. On August 17, 2000, this court found this argument unconvincing, and still

finds it so. Just because Huff's action may not fit the classic profile of a Rule 23, Fed.R.Civ.P., class action does not mean that the action could not be framed to take advantage of that rule. More to the point, the language of § 77p(f)(2)(A)(i) casts a wider net than Rule 23. The bottom line is that this complaint, as drafted, would be prohibited by SLUSA if SLUSA applies.

If SLUSA applies, it will deny Huff and the individuals on whose behalf it purports to act the efficient resolution of claims naturally suited to group action and will expose them to the shortcomings inherent in separate actions. Such exposure runs counter to the concepts of fair notice, reasonable reliance, and settled expectations and would attach new legal consequences to completed events that form the factual basis for Huff's complaint. [FN3] *See, e.g., Martin*, 527 U.S. at 357-60, 119 S.Ct. 1998, 144 L.Ed.2d 347 (holding that retrospective application of a limitation on attorneys' fees for postjudgment monitoring services stemming from prison conditions litigation would have retroactive effect).

FN3. It is no answer to this point to say that in drafting SLUSA, Congress sought to address what it determined to be, through exercise of its fact-finding powers, an abuse of the established right to proceed as a class by the category of plaintiff into which Huff falls. This court does not dispute the fact that Congress can act prospectively to curb such abuse. That legislative prerogative is not at issue

> here. The question is whether dispossessing individuals, potential future plaintiffs, of that right after the occurrence of the events giving rise to their cause of action, attaches new legal consequences to those events. Expanding the temporal reach of a statute, whether forward or backward in time, will naturally further the ends sought by the legislation. That unremarkable proposition cannot overcome the presumption against retroactivity. *See Landgraf*, 511 U.S. at 285-86, 114 S.Ct. 1483, 128 L.Ed.2d 229.

An additional element of unfairness that underlies unanticipated legal consequences rests on the fact that at the time of Huff's alleged discussions and transactions with defendants, Huff was acting as an investment manager and as attorney-in-fact for unnamed clients who comprise the group which would otherwise have to proceed as individuals. Huff was treated by defendants as the representative of a group. It is not unreasonable, then, for Huff and its clients to have expected that if Huff was misled while operating in its representative capacity, it could bring suit in that same capacity under then existing legal theories to remedy the wrong. If Huff was the conduit for defendants' fraud on its clients, it is hardly fair to take away, post hoc, Huff's right to seek redress for that fraud.

While SLUSA, if it applies, would erase Huff's action under state law, it allows for the bringing of federal securities fraud claim in the form of a collective action. The legislative history of SLUSA

contains many indications that one of its intended effects is to control securities fraud class actions by leaving federal law as the source of legal rights for plaintiffs who choose to proceed as a class. *See, e.g.*, H.R. CONF. REP. NO. 105-640, at 13 (1998). However, even assuming arguendo that federal law provides substantially the same remedies as state law, if Huff re-fashioned its state law class action as a federal one, many of the claims would be time barred. A meaningful portion of its claims, if repled under federal law, would fall under § 10(b) of the Exchange Act and Rule 10b-5, which uses language very similar to 15 U.S.C. § 77p(b). The Supreme Court has held that such claims are subject to a 1-year statute of limitations period after discovery of the conduct constituting the violation, and a 3-year period of repose. *See Lampf. Pleva, Lipkind, Prupis, & Petigrow v. Gilbertson*, 501 U.S. 350, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991). Undoubtedly, under the facts pled by Huff, the operation of these limitations would eliminate a substantial portion of Huff's claims. While it is true that SLUSA does not by its terms dictate this result, especially considering the fact that statutes of limitation are affirmative defenses that must be pled, the practical effect of a retrospective application of SLUSA would be to trim down Huff's case to a virtual nothing. Not taking this eventuality into account when measuring the impact of retrospective application in this case would be holding Huff accountable for its "failure" to bring its state law claims within the periods of repose and limitation applicable to federal claims that are preemptive only if retroactive. This proposition shocks the conscience of this court.

Assuming that Huff and its unnamed clients could file substantially the same complaint under federal law, they could do so only by surrendering otherwise viable causes of action. The reasonable expectations they had at the time of the allegedly actionable conduct cannot be reconciled with such a relinquishment of a substantive right. [FN4]

> FN4. The court need not address the serious, but more speculative, argument concerning the combined effect of § 77p(f)(2)(A)(i) and (f)(2)(A)(ii) on the possibility of Huff and its clients receiving any hearing whatsoever on the merits of their state claims. Even if Huff and its clients were to escape the grasp of § 77p(f)(2)(A)(i) by filing a non-representative action, or actions, of less than 50 plaintiffs and subsequently were able to elude the grouping possibility anticipated in § 77p(f)(2)(A)(ii), they would still have been denied the procedural right to pursue effective relief in the form of a collective action. Because the court finds that § 77p(f)(2)(A)(i)'s limitations alone would have a retroactive effect, there is no need to determine whether retrospective application of the "covered class action" term would lead to an impermissible result in other ways.

There is one last rule of statutory construction that strongly militates against applying SLUSA to pre-enactment conduct. It arises from the principles of federalism and comity which

recognize that federal courts are courts of limited jurisdiction, so that any statute upon which a removal from state court can be based, must be construed against federal and in favor of state jurisdiction. When Congress is ambiguous on the question of the retroactivity of a preemptive federal statute, and when removability depends upon a retroactive application of that statute, the ambiguity must be resolved against removability and thus against retroactivity. This is the only way to recognize the primacy of the state courts as courts of first instance.

For the foregoing reasons, separate and in combination, this court cannot and will not grant defendants' motion to dismiss. To do so would constitute a dispositive ruling, something this court cannot do when it lacks subject matter jurisdiction because 15 U.S.C. § 77p(c) has no retrospective application. The only recourse is to send the case back to the court of competent jurisdiction from whence it came.

Conclusion

The action will be remanded. All pending motions not carried with the order of remand will be moot. A separate and appropriate order will be entered.

190 F.Supp.2d 1273, Fed. Sec. L. Rep. P 91,673

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

W.R. HUFF ASSET MANAGEMENT CO., L.L.C., etc.,	)	
Plaintiff,	)	CIVIL ACTION NO.
v.	)	00-AR-1630-S
BT SECURITIES CORPORATION, et al.,	)	
Defendants.	)	

ORDER OF REMAND

In accordance with the accompanying memorandum opinion, the court, as required by 28 U.S.C. §1447(c), upon finding that it lacks subject matter jurisdiction, ORDERS that the above-entitled case be REMANDED to the Circuit Court of Jefferson County, Alabama, from whence it was improvidently removed by defendants. The Clerk is DIRECTED to effectuate this order.

The parties shall bear their own respective costs incurred as a result of the removal.

DONE this [2nd] day of May, 2001.

WILLIAM M. ACKER, Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX F

Before EDMONDSON, HILL and LAY,* Circuit Judges.

PER CURIAM:

Dismiss for lack of jurisdiction, no exception to 28 U.S.C. § 1447(d) having been shown.

DISMISSED.

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* Honorable Donald P. Lay, United States Circuit Judge for the Eighth Circuit, sitting by designation.

APPENDIX G

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA CIVIL DIVISION

W.R. HUFF ASSET MANAGEMENT CO., L.L.C. etc,
Plaintiffs,

v.

CIVIL ACTION NUMBER: CV 00-2630

BT SECURITIES, CORPORATION, et al.
Defendants.

ORDER

This matter comes before the Court on Defendants' motion to dismiss. The Court having considered Defendants' motion and memorandum of law as well as Plaintiffs' response and having conducted oral argument of this matter on March 21, 2003 makes the following findings:

This action commenced on April 28, 2000. In a multi-count complaint Plaintiff alleges that commencing in early August 1995, it was solicited by certain of the Defendants to purchase certain Notes which were issued by said Defendants to finance the purchase of Bruno's, Inc. Beginning in November 1995, Plaintiff alleges that it commenced the purchase of the said Notes. Plaintiff, Huff Asset Management Co., LLC ("Huff") brings this action in its capacity "as investment manager and as attorney in fact for certain clients ("Beneficial Owners") who have held in excess of

$290 million in principle amount of 10½% Senior Subordinated Notes Due 2005 ("Notes") that were publicly offered by Bruno's, Inc. ("Bruno's") in August 1995 pursuant to registration under the Securities Act of 1933. (Plaintiff's complaint ¶ 11(16), p. 11). Plaintiff alleges the following claims:

Count I: Fraudulent Suppression, as against all Defendants, under the provisions of Ala. Code §6-5-100 & 102 (1975);

Count II: Fraudulent and Reckless Misrepresentation, as against all Defendants, under the provisions of Ala. Code §6-5-100 & 101 (1975);

Count III: Fraudulent and Reckless Deceit, as against all Defendants, under the provisions of Ala. Code §6-5-103 & 104 (1975);

Count IV: Violation of the Alabama Securities Act, as against all Defendants, under the provisions of Ala. Code §8-6-17(1975);

Count V: Negligent Misrepresentation, as against what is identified as "The Underwriter Defendants";

Count VI: Negligent Misrepresentation of Financial Information, against what is identified as the "Auditor Defendants"; and;

Count VII: Civil Conspiracy, as against all Defendants.

On June 14, 2000, Defendants filed notice of removal of the cause of action to the United States District Court for the Northern District of Alabama.

On August 17, 2000, Federal District Judge William Acker ruled that removal to the Federal District Court was proper, but nevertheless encouraged the parties to take an interlocutory appeal to the 11th Circuit Court of Appeals. This was attempted but the 11th Circuit rejected the appeal. Plaintiffs herein then prevailed upon Judge Acker to reconsider his previous ruling which the Court did. In a published opinion, ***W.R. Huff Asset Management Co., L.L.C. v. BT Securities***, *190 F.Supp.2d 1273 (N.D. Ala. 2001)* the Court remanded this matter back to the Jefferson County Circuit Court. In its May 2, 2001 order of remand, which accompanied the Court's memorandum opinion, the Court stated:

> " . . . [T]he court, as required by 28 U.S.C.A. §1447(c), upon finding that it lacks subject matter jurisdiction, ORDERS that the above-entitled case be REMANDED to the Circuit Court of Jefferson County. . ."

Defendants then, on January 24, 2003 filed the present motion to dismiss Plaintiffs' complaint based upon the preemption by the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), [PL 105-353 (S1260) 1998].

The basis of Defendants removal petition was their assertion that SLUSA applied to

Plaintiffs cause of action to preempt the asserted State claims in favor of the relief afforded by the Securities Act of 1933 (*15 U.S.C.A. §77a et seq.*) and the Securities Act of 1934 (*15 U.S.C.A. §78a et seq.*) Because the preemptive provisions of those Acts did not take effect until November 3, 1998 with the passage of the SLUSA amendments, and the conduct which serves as a basis for the action predated the enactment of the said amendments, Plaintiff's position before the Federal District Court was that the Act did not apply to preempt its state law claims. To so apply the Act, Plaintiffs have argued, would constitute an impermissible retroactive application. Defendants' position before the Federal District Court was that Plaintiffs complaint was not filed until after passage of the SLUSA amendments. Since SLUSA, by its express statutory language, does not apply to cases commenced or pending at the time of enactment[1], Defendants argued before the Federal District Court that it does apply to the case now before the Court and that based on its broad preemptive application should serve as a basis for removal of this action to Federal Court.

In rejecting Defendants argument, the Federal District Court directly addressed the issue of retroactive application of SLUSA and expressly determined that those amendments do not have retroactive applicability to pre-enactment conduct. In so finding, the Federal

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[1] (c) APPLICABILITY -- The amendments made by this section shall not affect or apply to any action commenced before and pending on the date of enactment of this Act. P.L. 105-353 §101(c).

District Court explicitly invoked §1447(c) and expressly stated that the basis for its remand order was its finding that it lacked subject matter jurisdiction founded upon its determination that SLUSA did not have retroactive application. Clearly Judge Acker's May 2, 2001 remand order is now final.

Defendants are before the Court under ARCP 12(b)(1) motion to dismiss averring that the Court lacks subject matter jurisdiction over Plaintiffs case. The appropriate standard of review to be exercised by the Court in considering Defendants' motion was set forth in ***Lyons v. River Road Const., Inc.***, *2003 WL 1146517 (Ala. 2003)* as follows:

> "The appropriate standard of review of a trial court's denial of a motion to dismiss is whether 'when the allegations of the complaint are viewed most strongly in the pleader's favor, it appears that the pleader could prove any set of circumstances that would entitle [the pleader] to relief." ***Nance v. Matthews***, *622 So.2d 297, 299 (Ala. 1993)*; ***Raley v. Citibanc of Alabama/Andalusia***, *474 So.2d 640, 641 (Ala. 1985)*. This Court does not consider whether the plaintiff will ultimately prevail, but only whether the plaintiff may possibly prevail. ***Nance***, *622 So.2d at 299* A 'dismissal is proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.' ***Nance***, *622 So.2d at 299*; ***Garrett v. Hadden***, *495*

So.2d 616, 617 (Ala. 1986); ***Hill v. Kraft, Inc.****, 496 So.2d 768, 769 (Ala. 1986). 2003 WL 1146517 at *2*

In other words, Defendants motion tests Plaintiffs' pleadings to determine whether Plaintiffs have set forth a plausible cause of action against Defendants. The only basis upon which Defendants challenge the sufficiency of Plaintiffs complaint is on the preemption issue posed by the retroactive application of the SLUSA amendments to the Securities Acts of 1933 and 1934, the denial of which was the basis of the federal district court's remand order.

Defendants have cited the Court to a California state court decision, ***Shaw v. Charles Schwab & Co., Inc.****, 2003 WL 1463842 (Cal. Superior, 2003)* which in turn cited ***Moreau v. San Diego Transit Corp.****, 210 Cal.App.3d 614 (Cal.App.4.Dist. 1989)* for the proposition that the Federal District Court's remand order which failed to find application of the federal statute as a basis for the exercise of federal removal jurisdiction, does not foreclose the State Court, on remand, from considering the preemption argument as a substantive defense to Plaintiffs' complaint. The California Court stated the following in its rationale for this holding:

> "In making its jurisdictional determination on a motion for remand, the district court looks no further than the complaint and the motion for removal. This limitation is one aspect of the "well-pled complaint" rule which holds a plaintiff is the "master"

> of his complaint and he may craft his causes of action, if he so desires, to exclude federal jurisdiction. Under the rule a federal question must appear from the complaint and not from any preemption defense which might be raised in state court and which might ultimately defeat the cause of action. (***Franchise Tax Bd. v. Laborers Vacation Trust*** *(1983) 463 U.S. 1, 9-11 [77 L.ed.2d 420, 430-432, 103 S.Ct.2841].)*
>
> However, an independent corollary to the "well-pled complaint" rule is the "artful pleading" rule or the "doctrine of complete preemption." This doctrine states that while couched in state contract or tort terms, federal jurisdiction exists if the issues actually raise an essentially federal question. In this case Transit's claim of preemption both in federal and state court was based on this doctrine.

When a federal court grants a motion for remand in the present context, it does nothing more than determine the complaint fails, either directly or by operation of the "artful pleading" doctrine, to state a question arising under federal law. It does not determine whether a preemption defense can be successfully offered in state court when the entire case is considered. As was stated in ***Survival Sys. V. U.S. District Court for the Southern District of California***, *825 F.2d 1416 (9th Cir. 1987):* "In this case, the order of remand did not resolve a matter of substantive law, as in ***Pelleport [Pelleport Investors v. Budco Quality***

***Theatres**, (9th Cir. 1984) 741 F.2d 273, 276-278] or **Clorox** [**Clorox v. U.S. Dist. Ct. for N.D. of California**, (9th Cir. 1985) 779 F.2d 517, 520].* The ruling of the district court was that the state cause of action alleged in Rodriquez's complaint was not an artfully pled federal claim that was preempted by federal labor law. This did not finally resolve the issue of preemption, which could still be raised as a defense to the state claim in state court. Thus, if the proof in the state court were such as to justify the conclusion that the cause of action was completely preempted by federal labor law, the defense of preemption could be sustained. The ruling of the district court was simply that the allegations of the complaint did not justify such a result.' (*See also **Caterpillar, Inc. v. Williams** (1987) 482 U.S. 386, 398, fn.13 [96 L.Ed.2d 318, 331, 107 S.Ct. 2425]; **Price v. PSA, Inc.** (9th Cir. 1987) 829 F.2d 871, 876*).

While we cannot determine the exact nature of the district court's determination, it clearly involved only the question of jurisdiction and thus Transit could properly assert its defense of preemption in state court. ***Shaw**, supra, at 620-21.*

Similarly, the removal petition filed in the case before this Court was not premised on the "well-pled complaint" doctrine, but on the "artful pleading doctrine". Removal was not premised on any count contained in Plaintiffs' complaint, but upon grounds that the entire field of litigation had been preempted by federal legislation around which Plaintiff attempted to artfully plead. As in the ***Shaw*** opinion, the Federal District Court

issued a remand order on an explicit finding that it lacked subject matter jurisdiction. ***Shaw*** ruled that when the federal court makes a finding that it lacks subject matter jurisdiction, then it could not have addressed the merits of the preemption defense, therefore the matter could be addressed by the state court on remand. The Court, however, must look to the exceptions cited in ***Moreau***, relied upon in ***Shaw*** so as to determine if the California ruling is applicable to the case now before it.

In one of those exceptions, ***Pelleport Investors v. Budco Quality Theatres***, *741 F.2d 273, (9th Cir. 1984)*, the federal district court remanded the case to state court, however, the Court found that the proscription contained in *28 USCA 1447(d)* regarding nonreviewability did not apply to the federal district court's remand order and that Defendants proper procedural course to review the remand order was an appeal to the 9th Circuit Court of Appeals. In ***Pelleport***, removal was opposed on two grounds, one, that diversity of citizenship of the parties, the basis for removal, did not exist; and, second, the contract at issue contained a forum selection clause, which specified the state court. The federal district court found that that it did not have subject matter jurisdiction on the express basis that the forum selection clause contained in the contract provided otherwise. In finding that the remand order was reviewable, the Court wrote:

> "Had the district court based its remand order on the first theory, *Section 1447(d)* would no doubt apply, because, even if

clearly erroneous, a district court's decision that it lacks subject matter jurisdiction to hear a case is not reviewable. *See* ***Thermtron Products, Inc. v. Hermansdorfer***, *423 U.S. 336, 343, 96 S.Ct. 584, 589, 46 L.Ed.2d 542 (1976)*. But the court did not base its remand order on lack of subject matter jurisdiction. It relied instead upon the forum selection clause. The novel question before this court, then, is whether a remand order based on the enforceability of such a clause is reviewable. We believe it is. . . . Budco argues that, because enforceability of a forum selection clause, like court congestion, is a ground "wholly different" from the grounds for remand specified in *Section 1447(c), Section 1447(d)* does not apply, and the remand order is reviewable. *See* ***Thermtron***, *423 U.S. at 344, 96 S.Ct., at 58.* Although we agree that enforceability of a forum selection clause is not a ground specified in *Section 1447(c)*, equating this case with ***Thermtron*** is difficult.

The confusion appears to be generated by the label of remand. Once the fact of remand is separated from the reason for its issuance, however, it becomes clear that the district court did not merely remand this case to the state court; it reached a substantive decision on the merits apart from any jurisdictional decision.. . .

Budco presents an even stronger case for review. In **Waco [v. United States Fidelity & Guaranty Co.**, 293 U.S. 140, 55 S.Ct. 6, 79 L.Ed. 244 (1935)] and **Armstrong [v. Alabama Power Co.**, 667 F.2d 1385, 1387 (11th Cir. 1982]), the district courts issued remand orders based on lack of subject matter jurisdiction, a basis clearly enumerated in section 1447(c). The cases stand for the proposition that although the final determination that diversity is lacking is not reviewable, the earlier determination that a third party defendant must be dismissed from the action is. Here, the district court ordered the case remanded to state court after it found the parties' agreement to litigate in state court enforceable. Not only did the court's determination that the forum selection clause was valid and enforceable precede the remand order, it formed the basis of that order. Like the dismissal in **Waco**, the court's decision that the contract clause is enforceable, if not reversed or set aside, is conclusive upon Budco, and, therefore, must be reviewed. To hold otherwise would deprive Budco of its right to appeal a substantive determination of contract law. We cannot believe that Congress intended to immunize such decisions from review....

The policy underlying the general nonreviewability rule of *Section 1447(d)* is to prevent delay by protracted litigation

over jurisdictional issues. *See* ***Thermtron***, *423 U.S. at 351, 96 S.Ct. at 593;* ***United States v. Rice***, *327 U.S. 742, 751, 66 S.Ct. 835, 838 90 L.Ed. 982 (1946)* (construing the predecessor to *section 1447(d)*). Congress' concern that parties might use the appeal process to protract litigation over jurisdictional issues and thereby further delay litigation over the merits of the case reflects a balancing of competing interests resolved in favor of judicial economy. The availability of a federal forum through the removal procedure had to be weighed against the interest of expeditious resolution of a dispute initiated in state court. Congress decided that in cases begun in state court, lengthy delays occasioned by federal appeals over jurisdictional issues are unacceptable. Consequently, the district court is the final arbiter of whether it has jurisdiction to hear the case. But where a district court bypasses the jurisdictional arguments and reaches the merits of a contract dispute, the policy is inapplicable. Any delay caused by an appeal of the contract issue is a delay that must be countenanced. To apply *section 1447(d)* to the district court's decision on the enforceability of the forum selection clause would extend the scope of *section 1447(d)* far beyond its intended parameters and would leave matters of substantive contract law unreviewable. We refuse to impute such an intent to Congress." 741 F.2d at 277-78.

The Court's examination of Judge Acker's remand order indicates that the ruling in ***Pelleport***, *supra*, an exception to the ruling in ***Moreau***, is more applicable to the case now before it. Judge Acker not only remanded the case on a finding that the federal court lacked subject matter jurisdiction, but he premised that finding of lack of subject matter jurisdiction on a merits determination that the federal legislation, which Defendants aver impose complete federal preemption, did not apply to the pre-enactment conduct which Plaintiffs allege to be actionable. As such, the remand order in this case, as was the case in ***Pelleport***, was properly reviewable for its merits determination on the issue of retroactivity, by the 11th Circuit Court of Appeals.

Furthermore, because the issue of retroactive application of SLUSA has already been ruled upon in this case by the Federal District Court, the doctrine of the law of the case applies to that ruling. Citing to ***Blumberg v. Touche Ross & Co.***, *514 So.2d 922 (Ala. 1987)*, the Alabama Supreme Court in ***Quimby v. Memorial Parks, Inc.***, *835 So.2d 134 (Ala.,2002)* wrote the following:

> "According to the doctrine of the law of the case, 'whatever is once established between the same parties in the same case continues to be the law of that case, whether or not correct on general principles, so long as the facts on which the decision was predicated continue to be the facts of the case.' ***Blumberg v. Touche Ross & Co.***, *514 So.2d 922, 924 (Ala.*

1987).... Because the trial court entered [its] judgment on the same record as that before the Court of Civil Appeals, the facts on which the Court of Civil Appeals' decision was predicated continue to be the facts of the case, and, therefore, the Court of Civil Appeals' conclusions in its . . . opinion are the law of the case.' ***Ex parte S.T.S.***, *806 So.2d 336, 341-42 (Ala. 2001).*" 835 So.2d at 135-36.

Defendants, in their briefs and argument to the Court, cited other Federal District Courts which have, since Judge Acker's order, reached different conclusions on the issue of retroactive application of SLUSA to pre-enactment conduct. However, Defendants have not made a showing to the Court that the underlying facts upon which Judge Acker's ruling was based have changed.

In any event, the Court finds the rationale employed by the federal district court to be compelling in its finding that SLUSA, to be applied to this case, necessarily would require a retroactive application which is impermissible. The competing authorities posed by Plaintiffs and Defendants, that authored by District Judge Acker, ***W.R. Huff Asset Management Co., L.L.C. v. BT***, *190 F.Supp.2d 1273 (N.D.Ala. 2001)*; and by District Judge Bowdre, ***W.R. Huff Asset Management Co., LLC v. Kohlberg***, *234 F.Supp.2d 1218 (N.D.Ala., 2002)* both cite to common authority, ***Landgraf v. USI Film Prod.***, *511 U.S. 244, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994)*, for their very different conclusions regarding the appropriateness of retroactive

application of SLUSA. The heart of the Landgraft opinion on this issue is contained on page 1505 of the ruling where the Court wrote:

> "When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result." 114 S.Ct. at 1505.

Both lines of authority cited by Plaintiffs and Defendants concede that the legislative language contained in the SLUSA Amendments addressing the Act's temporal reach do not pass the test of serving as a clear and unambiguous statement of Congressional intent, therefore rules of judicial construction must be applied in order to determine whether the civil statute was intended to or may have a retroactive application. The language adopted by the Court in ***Landgraft***, as cited hereinabove, is essentially at the root of

the differing interpretations, which the parties have presented to the Court. That language is lifted directly from the opinion in ***Society for the Propagation of the Gospel v. Wheeler***, *22 F.Cas. 756 (C.C.N.H. 1814)*. In that case, Mr. Justice Story addressed the issue of the applicability of a statute enacted in June 19, 1805 by the New Hampshire legislature which established a 6 year statute of limitations for the filing of certain claims dealing with rights to real property. Prior to the passage of the Act, only the equitable principle of laches, if any, applied as a time constraint upon potential plaintiffs to exercise their right to file a claim and not be time barred. The Court thus wrote:

> "The present action was brought in 1807, and if, as the tenants contend, the act applies to it, it must be upon the ground, that the six years' possession under a supposed legal title is to be calculated backwards, from the time of the commencement of the action, although that time should not have elapsed after the date of the act. And in this view, the argument to support its constitutionality must be the same, as though the action were commenced immediately after the passage of the act. It may be admitted, that if this were a mere statute of limitations, barring the actions in the realty after a reasonable time, under the exercise of legislative discretion, its constitutionality could not be doubted. And if the statute had declared, that if a party entitled should, for six years after

passing the act, or for six years after any ouster or disseisin in futuro, neglect to pursue his remedy for the recovery of his right, then the recovery should only be had upon the terms of the act, it might, perhaps, have fallen under the same consideration, for it would in effect be only a rigorous statute of limitations.

But if the legislature were to pass an act of limitations, by which all actions upon past disseisins were to be barred, without any allowance of time for the commencement thereof in futuro, it would be difficult to support its constitutionality, for it would be completely restropsective in its operation on vested rights. (citation omitted). But the present cannot be considered as a statute merely regulating a remedy, and prescribing the mode and time of proceeding. It confers an absolute right to compensation on one side, and a corresponding liability on the other, if the party would enforce his previously vested title to the land. And unless he should comply within a given time, his title, or, what is in effect the same thing, his remedy, is completely extinguished. It is not, therefore, in form, or in substance, a modification of the remedy, but a direct extinguishment of a vested right in all the improvements and erections on the land, which were annexed to the freehold. It also directly impairs the value of the vested right of the party in the land itself, inasmuch as it impairs the remedy, and

subjects the party to burthens, which may render the right not worth pursuing; and that too upon past considerations, respecting which the party had incurred no legal obligation, and had imputed to him no legal laches. If, indeed, it ought, as is alleged, to be the very essence of a new law, that it is to be a rule for future cases, 'nova constitutio futuris formam imponere debet, non praeteritis,' (Bract. lib. 4, fol. 228), and that it is against natural justice to apply it to past case, it would seem to follow, that an act, which works the effects, which have been stated, ought to be deemed a retrospective law within the prohibition of the constitution of New Hampshire; for it is a law for the decision of a civil cause, which affects past cases; and has a retroactive operation.. . .

On the whole, if the statute must have a construction, which will embrace the case at bar, with whatever reluctance it may be declared, in my judgment it is unconstitutional, inasmuch as it divests a vested right of the demandants, and vests a new right in the tenants, upon considerations altogether past and gone." 22 F.Cas. at 768.

It was within the context of interpreting such a statute that the Court wrote, with regard to whether a statute is retroactive or not:

"What is a retrospective law, within the true intent and meaning of this article? Is

> it confined to statutes, which are enacted to take effect from a time anterior to their passage? or does it embrace all statutes, which, though operating only from their passage, affect vested rights and past transactions? It would be a construction utterly subversive of all the objects of the provision, to adhere to the former definition. It would enable the legislature to accomplish that indirectly, which it could not do directly. *Upon principle, every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective; and this doctrine seems fully supported by authorities.*" (emphasis added) 22 F.Cas. at 767.

The operative effect of SLUSA and the express purpose of its passage in 1998, namely, to extinguish state "covered class actions" alleging fraud or misrepresentation in transactions involving "covered securities" and to force such claims into federal court requiring the parties to proceed under federal securities statutes, is in the legislative history of the Act. As the Court wrote in ***Lander v. Hartford Life & Annuity Ins. Co.***, *251 F.3d 101 (2nd Cir. Conn. 2001)*:

> "SLUSA is one of several federal securities statutes passed in the latter half of the 1990s which were intended to promote uniformity in the securities markets. In

1995, Congress passed the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Pub.L. 104-67, 109 Stat 737 (1995) (codified in part at *15 U.S.C. §§ 77z-1, 78u*, to provide uniform standards for class actions and other suits alleging fraud in the securities market. PSLRA was intended to prevent "strike suits" – meritless class actions that allege fraud in the sale of securities. *See* H.R. Conf. Rep. No. 105-803 (1998). Because of the expense of defending such suits, issuers were often forced to settle, regardless of the merits of the action. *See* H.R. Conf. Rep, 104-369 (1995). PSLRA addressed these concerns by instituting, *inter alia*, heightened pleading requirements for class actions alleging fraud in the sale of national securities, see 15 *U.S.C. § 78u-4*, and a mandatory stay of discovery so that district courts could first determine the legal sufficiency of the claims in all securities class actions, *see 15 U.S.C. § 77z-1(b)*. These mechanisms were intended to 'enact reforms to protect investors and maintain confidence in our capital markets' by 'discourag[ing] frivolous litigation.' H.R. Conf. Rep. 104-369 (1995). PSLRA also has the effect, however, of discouraging non-frivolous litigation.

By 1998, however, it became clear to Congress that many of the goals of PSLRA had not been realized. According to SLUSA's Congressional findings, many

> class action plaintiffs avoided the stringent procedural hurdles erected by PSLRA by bringing suit in state rather than federal court. *See* Pub. L. No. 105-353 §2(2). By suing in state court under state statutory or common law, these litigants were able to assert many of the same causes of action, but avoid the heightened procedural requirements instituted in federal court. *See id.* According to a joint House-Senate Committee Report, the decline in federal securities class action suits that occurred after the passage of PSLRA was accompanied by a nearly identical increase in state court filings. *See* H.R. Conf. Rep. No. 105-803 (1998).
>
> SLUSA was passed in 1998 primarily to close this loophole in PSLRA. It did this by making federal court the exclusive venue for class actions alleging fraud in the sale of certain covered securities and by mandating that such class actions be governed exclusively by federal law. *See 15 U.S.C. §§ 77p(b)-(c).*" 251 F.3d at 107-108.

The federal district court took the only meaning that the clear legislative intent allowed, which was that SLUSA was meant to extinguish rights of covered class action litigants to proceed in state court alleging state claims that involved covered securities, and thus escape the operation of Private Securities Litigation Reform Act of 1995 (PSLRA). The characteristics of impermissible retroactive application of civil statutes

enumerated by Mr. Justice Story, namely, " . . . [E]very statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective" exist in the authority in the disjunctive rather than the conjunctive.

From August 1995, the time when Plaintiff alleges its right to proceed in state court arose, to the effective date of the SLUSA amendments on November 3, 1998, Plaintiffs had the right to proceed in state court seeking their state law remedies without impairment from the federal securities statutes. On November 3, 1998 that right, under a retroactive application of the SLUSA amendment would not only be impaired but extinguished. As was the case in ***Society for the Propagation of the Gospel v. Wheeler***, which is the basis for the opinion in ***Landgraf***, with regard to the determination of permissible or impermissible retroactive application of civil litigation, retroactive application in this case not only destroys a remedy but a right. As this was the basis for Judge Acker's remand order, this Court finds no basis upon which to challenge that Court's reasoned conclusion.

The foregoing matters and authority having been considered by this Court, Defendants motion to Dismiss Plaintiffs complaint is hereby DENIED.

DONE AND ORDERED THIS THE ___ DAY OF MARCH, 2003.

_____

CIRCUIT JUDGE

APPENDIX H

§ 77v. Jurisdiction of offenses and suits

(a) Federal and State courts; venue; service of process; review; removal; costs

The district courts of the United States and the United States courts of any Territory shall have jurisdiction of offenses and violations under this subchapter and under the rules and regulations promulgated by the Commission in respect thereto, and, concurrent with State and Territorial courts, except as provided in section 77p of this title with respect to covered class actions, of all suits in equity and actions at law brought to enforce any liability or duty created by this subchapter. Any such suit or action may be brought in the district wherein the defendant is found or is an inhabitant or transacts business, or in the district where the offer or sale took place, if the defendant participated therein, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found. Judgments and decrees so rendered shall be subject to review as provided in sections 1254, 1291, 1292, and 1294 of Title 28. Except as provided in section 77p(c) of this title, no case arising under this subchapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States. No costs shall be assessed for or against the Commission in any proceeding under this subchapter brought by or against it in the Supreme Court or such other courts.

§ 77p. Additional remedies; limitation on remedies

(a) Remedies additional

Except as provided in subsection (b), the rights and remedies provided by this subchapter [15 U.S.C.A. § 77a et seq.] shall be in addition to any and all other rights and remedies that may, exist at law or in equity.

(b) Class action limitations

No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging--

(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or

(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

(c) Removal of covered class actions

Any covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).

(d) Preservation of certain actions

(1) Actions under State law of State of incorporation

(A) Actions preserved

Notwithstanding subsection (b) or (c), a covered class action described in subparagraph (B) of this paragraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

(B) Permissible actions

A covered class action is described in this subparagraph if it involves--

(i) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

(ii) any recommendation, position, or other communication with respect to the sale of securities of the issuer that--

(I) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

(II) concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

(2) State actions

(A) In general

Notwithstanding any other provision of this section, nothing in this section may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

(B) State Pension plan defined

For purposes of this paragraph, the term "State pension plan" means a pension plan established and maintained for its employees by the government of the State or political subdivision thereof, or by any agency or instrumentality thereof.

(3) Actions under contractual agreements between issuers and indenture trustees

Notwithstanding subsection (b) or (c), a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

(4) Remand of removed actions

In an action that has been removed from a State court pursuant to subsection (c), if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

(e) Preservation of State jurisdiction

The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

(f) Definitions

For purposes of this section, the following definitions shall apply:

(1) Affiliate of the issuer

The term "affiliate of the issuer" means a person that directly or indirectly through one

or more intermediaries, controls or is controlled by or is under common control with, the issuer.

(2) Covered class action--

(A) In general

The term "covered class action" means--

(i) any single lawsuit in which--

(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or

members of the prospective class predominate over any questions affecting only individual persons or members; or

(**ii**) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which--

(**I**) damages are sought on behalf of more than 50 persons; and

(**II**) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

(B) Exception for derivative actions

Notwithstanding subparagraph (A), the term. "covered class action" does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

(C) Counting of certain class members

For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person

or prospective class member, but only if the entity is not established for the purpose of participating in the action.

(D) Rule of construction

Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.

(3) Covered security

The term "covered security" means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 77r(b) of this title at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under this subchapter pursuant to rules issued by the Commission under section 77d(2) of this title.

(May 27, 1933, c. 38, Title 1, § 16, 48 Stat. 84; Nov. 3, 1998, Pub.L. 105-353, Title I, § 101(a)(1), 112 Stat. 3227.)

APPENDIX I

Securities Litigation Uniform Standards Act

ONE HUNDRED FIFTH CONGRESS OF THE UNITED STATES OF AMERICA
At the Second Session

Begun and held at the City of Washington on Tuesday, the twenty-seventh day of January, one thousand nine hundred and ninety-eight

An Act to reform Federal securities litigation, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Securities Litigation Uniform Standards Act of 1998".

SEC. 2. FINDINGS.

The Congress finds that –

(1) the Private Securities Litigation Reform Act of 1995 sought to prevent abuses in private securities fraud lawsuits;

(2) since enactment of that legislation, considerable evidence has been presented to Congress that a number of securities class action

lawsuits have shifted from Federal to State courts;

(3) this shift has prevented that Act from fully achieving its objectives;

(4) State securities regulation is of continuing importance, together with Federal regulation of securities, to protect investors and promote strong financial markets; and

(5) in order to prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objectives of the Private Securities Litigation Reform Act of 1995, it is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities, while preserving the appropriate enforcement powers of State securities regulators and not changing the current treatment of individual lawsuits.

TITLE I – SECURITIES LITIGATION UNIFORM STANDARDS

Sec. 101. LIMITATION ON REMEDIES.

(a) Amendments to the Securities Act of 1933.--

(1) Amendment.—Section 16 of the Securities Act of 1933 (15 U.S.C. 77p) is amended to read as follows:

"SEC. 16. ADDITIONAL REMEDIES; LIMITATION ON REMEDIES.

"(a) Remedies Additional.—Except as provided in subsection (b), the rights and remedies provided by this title shall be in addition to any and all other rights and remedies that may exist at law or in equity.

"(b) Class Action Limitations.—No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging –

"(1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or

"(2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

"(c) Removal of Covered Class Actions. – Any covered class action brought in any State court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).

"(d) Preservation of Certain Actions.—

"(1) Actions under state law of state of incorporation.—

"(A) Actions preserved.—Notwithstanding subsection (b) or (c) a covered class action described in subparagraph (B) of this paragraph that is based upon the statutory or common law

of the State in which the issuer the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

"(B) Permissible actions. – A covered class action is described in this subparagraph if it involves--

"(i) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

"(ii) any recommendation, position, or other communication with respect to the sale of securities of the issuer that --

"(I) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

"(II) concerns decisions of those equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

"(2) State actions.—

"(A) In general.—Notwithstanding any other provision of this section, nothing in this section may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are

named plaintiffs, and that have authorized participation, in such action.

"(B) State pension plan defined.—For purposes of this paragraph, the term "State pension plan" means a pension plan established and maintained for its employees by the government of the State or political subdivision thereof, or by any agency or instrumentality thereof.

"(3) Actions under contractual agreements between issuers an indenture trustees.—Notwithstanding subsection (b) or (c), a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

"(4) Remand of removed actions.—In an action that has been removed from a State court pursuant to subsection (c), if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

"(e) Preservation of State Jurisdiction.—The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

"(f) Definitions.—For purposes of this section, the following definitions shall apply:

"(1) Affiliate of the issuer.—The term "affiliate of the issuer" means a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

"(2) Covered class action.—

"(A) In general.—The term "covered class action" means—

"(i) any single lawsuit in which—

"(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

"(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

"(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which--

"(I) damages are sought on behalf of more than 50 persons; and

"(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

"(B) Exception for derivative actions.—Notwithstanding subparagraph (A), the term "covered class action" does not include an exclusively derivative action brought by one or more shareholders on behalf of a corporation.

"(C) Counting of certain class members.—For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

"(D) Rule of construction—Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action.

"(3) Covered security.—The term "covered security" means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 18(b) at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under this title pursuant to rules issued by the Commission under section 4(2)."

(2) Circumvention of stay of discovery.—Section 27(b) of the Securities Act of 1933 (15 U.S.C. 77z-1(b)) is amended by inserting after paragraph (3) the following new paragraph:

"(4) Circumvention of stay of discovery.—Upon a proper showing, a court may stay discovery proceedings in any private action in a State court as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to this subsection."

(3) Conforming amendments.—Section 22(a) of the Securities Act of 1933 (15 U.S.C. 77v(a)) is amended—

(A) by inserting "except as provided in section 16 with respect to covered class actions," after "Territorial courts,"; and

(B) by striking "No case" and inserting "Except as provided in section 16(c), no case".

(b) Amendments to the Securities Exchange Act of 1934.—

(1) Amendment.—Section 28 of the Securities Exchange Act of 1934 (15 U.S.C. 78bb) is amended—

(A) in subsection (a), by striking "The rights and remedies" and inserting "Except as provided in subsection (f), the rights and remedies"; and

(B) by adding at the end the following new subsection:

"(f) Limitations on Remedies.—

"(1) Class action limitations.—No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging—

"(A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or

"(B) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

"(2) Removal of covered class actions.—Any covered class action brought in any State court involving a covered security, as set forth in paragraph (1), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to paragraph (1).

"(3) Preservation of certain actions.—

"(A) Actions under state law of state of incorporation.—

"(i) Actions preserved.—Notwithstanding paragraph (1) or (2), a covered class action described in clause (ii) of this subparagraph that is based upon the statutory or common law of the State in which the issuer is incorporated (in the case of a corporation) or organized (in the case of any other entity) may be maintained in a State or Federal court by a private party.

"(ii) Permissible actions.—A covered class action is described in this clause if it involves—

"(I) the purchase or sale of securities by the issuer or an affiliate of the issuer exclusively from or to holders of equity securities of the issuer; or

"(II) any recommendation, position, or other communication with respect to the sale of securities of an issuer that—

"(aa) is made by or on behalf of the issuer or an affiliate of the issuer to holders of equity securities of the issuer; and

"(bb) concerns decisions of such equity holders with respect to voting their securities, acting in response to a tender or exchange offer, or exercising dissenters' or appraisal rights.

"(B) State actions.--

"(i) In general.—Notwithstanding any other provision of this subsection, nothing in this subsection may be construed to preclude a State or political subdivision thereof or a State pension plan from bringing an action involving a covered security on its own behalf, or as a member of a class comprised solely of other States, political subdivisions, or State pension plans that are named plaintiffs, and that have authorized participation, in such action.

"(ii) State pension plan defined.—For purposes of this subparagraph, the term "State pension plan" means a pension plan established and maintained for its employees by the

government of a State or political subdivision thereof, or by any agency or instrumentality thereof.

"(C) Actions under contractual agreements between issuers and indenture trustees.—Notwithstanding paragraph (1) or (2), a covered class action that seeks to enforce a contractual agreement between an issuer and an indenture trustee may be maintained in a State or Federal court by a party to the agreement or a successor to such party.

"(D) Remand of removed actions.—In an action that has been removed from a State court pursuant to paragraph (2), if the Federal court determines that the action may be maintained in State court pursuant to this subsection, the Federal court shall remand such action to such State court.

"(4) Preservation of state jurisdiction.—The securities commission (or any agency or office performing like functions) of any State shall retain jurisdiction under the laws of such State to investigate and bring enforcement actions.

"(5) Definitions.—For purposes of this subsection, the following definitions shall apply:

"(A) Affiliate of the issuer.—The term "affiliate of the issuer" means a person that directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with, the issuer.

"(B) Covered class action.—The term "covered class action" means—

"(i) any single lawsuit in which—

"(I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons or members of the prospective class, without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or

"(II) one or more named parties seek to recover damages on a representative basis on behalf of themselves and other unnamed parties similarly situated, and questions of law or fact common to those persons or members of the prospective class predominate over any questions affecting only individual persons or members; or

"(ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which—

"(I) damages are sought on behalf of more than 50 persons; and

"(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

"(C) Exception for derivative actions.—Notwithstanding subparagraph (B), the term "covered class action" does not include an

exclusively derivative action brought by one or more shareholders on behalf of a corporation.

"(D) Counting of certain class members.—For purposes of this paragraph, a corporation, investment company, pension plan, partnership, or other entity, shall be treated as one person or prospective class member, but only if the entity is not established for the purpose of participating in the action.

"(E) Covered security.—The term "covered security" means a security that satisfies the standards for a covered security specified in paragraph (1) or (2) of section 18(b) of the Securities Act of 1933, at the time during which it is alleged that the misrepresentation, omission, or manipulative or deceptive conduct occurred, except that such term shall not include any debt security that is exempt from registration under the Securities Act of 1933 pursuant to rules issued by the Commission under section 4(2) of that Act.

"(F) Rule of construction.—Nothing in this paragraph shall be construed to affect the discretion of a State court in determining whether actions filed in such court should be joined, consolidated, or otherwise allowed to proceed as a single action."

(2) Circumvention of stay of discovery.—Section 21D(b)(3) of the Securities Exchange Act of 1934 (15 U.S.C. 78u-4(b)(3)) is amended by adding at the end the following new subparagraph:

"(D) Circumvention of stay of discovery.—Upon a proper showing, a court may stay discovery proceedings in any private action in a State court, as necessary in aid of its jurisdiction, or to protect or effectuate its judgments, in an action subject to a stay of discovery pursuant to this paragraph."

(c) Applicability.—The amendments made by this section shall not affect or apply to any action commenced before and pending on the date of enactment of this Act.

Sec. 102. PROMOTION OF RECIPROCAL SUBPOENA ENFORCEMENT.

[Omitted]

TITLE II—REAUTHORIZATION OF THE SECURITIES AND EXCHANGE COMMISSION

[Omitted]

TITLE III—CLERICAL AND TECHNICAL AMENDMENTS

Sec. 301. [Omitted]

Sec. 302. EXEMPTION OF SECURITIES ISSUED IN CONNECTION WITH CERTAIN STATE HEARINGS.

Section 18(b)(4)(C) of the Securities Act of 1933 (15 U.S.C. 77r(b)(4)(C) is amended by striking "paragraph (4) or (11)" and inserting "paragraph (4), (10), or (11)."

Approved November 3,1998
Speaker of the House of Representatives.
Vice President of the United States and President of the Senate.

APPENDIX J

§ 1447. Procedure after removal generally.

* * *

(c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.